

300 NLRB No. 7

SCO

D--1510
Tucson, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WAREHOUSE SUPERMARKETS OF ARIZONA, INC.,
d/b/a WAREHOUSE FOODS

and

Case 28--CA--10420

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 99R, UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION, AFL--CIO, CLC

DECISION AND ORDER

By Chairman Stephen and Member Cascraft and Oviatt

On August 2, 1990, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 28--RC--4726. (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); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On September 5, 1990, the General Counsel filed a Motion for Summary Judgment. On September 6, 1990, 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 the Respondent admits its refusal to bargain, but attacks the validity of the certification on the ground that certain preelection misconduct prevented the holding of a fair and free election, which conduct formed the basis of its objection to the results of the election filed in the representation proceeding.

All representation 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. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, Warehouse Supermarkets of Arizona, Inc., d/b/a Warehouse Foods, an Arizona corporation, is engaged in the retail sale of groceries at its facility in Tucson, Arizona, where it annually derives gross revenues in excess of \$500,000 and purchases and receives goods and materials valued in excess of \$50,000, which were transported in interstate commerce and delivered to its place of business in the State of Arizona directly from suppliers located outside the State of Arizona. 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 September 29, 1989, the Union was certified on April 12, 1990, as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time selling and nonselling meat department employees employed by the Respondent at its facilities located in Tucson, Arizona; but excluding all other employees, grocery employees, general merchandise employees, office and store clerical employees, confidential employees, guards, meat managers, and all other 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 April 25, 1990, the Union has requested the Respondent to bargain and, since May 3, 1990, 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 May 3, 1990, 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, Warehouse Supermarkets of Arizona, Inc., d/b/a Warehouse Foods, Tucson, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers Union, Local 99R, United Food and Commercial Workers International Union, AFL--CIO, CLC, 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 full-time and regular part-time selling and nonselling meat department employees employed by the Respondent at its facilities located in Tucson, Arizona; but excluding all other employees, grocery employees, general merchandise employees, office and store clerical employees, confidential employees, guards, meat managers, and all other supervisors as defined in the Act.

(b) Post at its facilities in Tucson, Arizona, copies of the attached notice marked "'Appendix.'"¹ Copies of the notice, on forms provided by the Regional Director for Region 28, 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.

¹ 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.'"

(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. September 28, 1990

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Clifford R. Oviatt, Jr., 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 United Food and Commercial Workers Union, Local 99R, United Food and Commercial Workers International Union, AFL--CIO, CLC, 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 and regular part-time selling and nonselling meat department employees employed by the Respondent at its facilities located in Tucson, Arizona; but excluding all other employees, grocery employees, general merchandise employees, office and store clerical employees, confidential employees, guards, meat managers, and all other supervisors as defined in the Act.

WAREHOUSE SUPERMARKETS OF ARIZONA,
INC., d/b/a WAREHOUSE FOODS

(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, 234 North Central Avenue, Suite 440, Phoenix, Arizona 85004-2212, Telephone 602--261--3188.