

Spring Arbor Distribution Company and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO. Case 7-CA-34106

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On July 13, 1993, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Spring Arbor Distribution Company, Belleville, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(f).

“(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.”

¹We shall modify the notification paragraph of the judge's recommended Order to correct an inadvertent error.

Joseph P. Canfield, Esq., for the General Counsel.
David B. Gunsberg, Esq. (Gunsberg & Breskin, P.C.), of Bloomfield Hills, Michigan, for the Respondent.
Brenda Paton, Organizer, Region 1(A), United Automobile Workers, of Taylor, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard in Detroit, Michigan, on June 2, 1993, on General Counsel's complaint dated February 11, 1993,¹ which alleges, in substance, that Spring Arbor Distribution Co., the Respondent, violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of unit employees; and by refusing to furnish certain information to the Union which in-

¹Respondent's answer admits that the underlying charge in this proceeding was filed by International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the Union) on January 11, 1993, and served on Respondent on January 12, 1993. The answer also admits that an amended charge in this proceeding was filed and served on Respondent on February 2, 1993.

formation was allegedly necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

Respondent's timely filed answer denies certain allegations of the complaint, admits others, but denies the commission of unfair labor practices.

At the hearing, all parties were represented by counsel or otherwise were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, all parties waived final argument and requested the opportunity to submit posthearing briefs. Respondent submitted a timely brief which has been duly considered.

On the entire record, including Respondent's brief, and on the entire record of evidence established here, I make the following

FINDINGS OF FACT

I. RESPONDENT AS A STATUTORY EMPLOYER

The complaint alleges and Respondent admits that at all material times Respondent, a corporation with an office and place of business in Belleville, Michigan, has been engaged in the nonretail distribution of religious books and related materials. It admits that during the calendar year ending December 31, 1992, Respondent, in conducting its aforesaid business operations, sold and shipped from its Michigan facility goods and materials valued in excess of \$50,000 directly to points outside the State of Michigan. Finally, Respondent admits, and I find, that at all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that, at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Chronology*

1. On April 9, 1991, International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, the Charging Party, filed a petition for certification (Case 7-RC-19552) as the exclusive collective-bargaining representative of a unit of Respondent's employees located at Respondent's Belleville, Michigan facility, and on April 30, 1991, the Regional Director for Region 7 of the National Labor Relations Board approved a Stipulated Election Agreement executed by the parties.

2. On June 7, 1991, an election by secret ballot was held in the following collective-bargaining unit:

All full-time and regular part-time production employees including checkers, packers, receivers, shelvees, shippers, stock controllers, processing employees, selectors, and warehouse employees employed by the Respondent at its facility located at 10885 Textile Road, Belleville, Michigan, but excluding all office clerical employees, confidential employees, professional employees, customer service employees, computer entry

employees, guards and supervisors as defined in the Act.

3. On April 8, 1992, the aforesaid election was set aside (Member Oviatt dissenting) based on the Respondent's objectionable conduct.

4. On April 24, 1992, the Regional Director scheduled a second election for May 28, 1992.

5. On May 13, 1992, Respondent requested that the Board review the Regional Director's Direction of Election and to stay the election alleging, inter alia, that contemplated changes in the unit had rendered the certified unit no longer appropriate.

6. On May 27, 1992, the Board denied the Respondent's request for review.

7. On May 28, 1992 the Board conducted a second election in the above-described unit.

8. On May 28, as a result of the election, the tally of ballots showed, inter alia, that of 123 eligible voters, there were 90 determinative challenges filed by Respondent.

9. On July 1, 1992, the Regional Director issued his Report and Recommendations on Determinative Challenges and Objections in Case 7-RC-19552.

10. On July 28, 1992, Respondent filed exceptions to the Regional Director's July 1, 1992 report and recommendations as described above in paragraph 8.

11. On September 25, 1992, the Board issued its supplemental decision wherein it overruled Respondent's challenges and directed the Regional Director to open the 90 challenged ballots and issue a revised tally of ballots.

12. On October 6, 1992, the Regional Director, complying with the Board's Order, issued a revised tally of ballots wherein of the 123 eligible unit voters, 72 voted in favor of the Union, 47 voted against the Union, and there were 4 undeterminative challenged ballots.

13. On October 14, 1992, the Board certified the Charging Party as the exclusive collective-bargaining representative in the above unit found appropriate for bargaining within the meaning of Section 9(b) of the Act.

14. At all times since the aforesaid October 14, 1992 certification, the Union has been the exclusive collective-bargaining representative of the employees in the above appropriate unit for purposes of Section 9(a) of the Act.

15. On October 28, 1992, the Union addressed a letter to Respondent wherein, inter alia, it noted that the Union had been certified as the exclusive bargaining representative, of unit employees; and (2) formally requested Respondent to furnish to it the following information "in order to enable the parties to enter into a constructive and productive set of negotiations to reach an acceptable agreement": (a) current list of all bargaining unit employees; (b) the average total labor cost per hour per employee; (c) current list of all fringe benefits provided to employees in the past 3 years; (d) current list of all fringe benefits provided to employees; (e) information concerning any pension plan among Respondent's unit employees; (f) a copy of the current employee handbook; (g) a copy of the current company policy manual; (h) a list of all temporary and/or probationary workers currently employed; and (i) a detailed list of all work currently subcontracted by Kelly Services or any other temporary services, etc.

At the hearing, Respondent offered, and, on General Counsel's objection, I refused to receive, evidence pertaining to (1) a summary of layoffs at the Respondent's Belleville, Michigan facility starting on or about May 29, 1992, and ending on or about June 26, 1992, relating to 90 laid-off employees; (2) an agreement of sale of a Tennessee property to Respondent, dated November 29, 1991, the purchase of which was effectuated in January 1992; (3) a list of employees who were given the option to continue to work at the Michigan facility; and (4) a July 1, 1992 letter from Respondent to the National Labor Relations Board relating to the conversion of the Michigan facility from a central, national warehouse to a regional warehouse.

Respondent conceded at the hearing that it had supplied all of the above-rejected, proffered information to the Board prior to the issuance, on September 25, 1992, of the Board's supplemental decision wherein the Board overruled Respondent's challenges and directed the opening of the 90 challenged ballots.

Further, at the hearing, Respondent admitted that it failed and refused to furnish the information in the Union's October 28, 1992 request notwithstanding that the requested information related to unit employees. Respondent moreover conceded that if its contention that the unit is inappropriate is rejected by the Board, then Respondent's failure and refusal to provide the information constituted, as alleged, a violation of Section 8(a)(5) and (1) of the Act (subject to any review in a court of appeals).

B. Contentions of the Parties

The Respondent contends that the Belleville, Michigan unit is not an appropriate unit because, as it had previously informed the Board during the representation proceeding, Respondent intended to move the location of its facility to Tennessee and lay off 90 employees, all of which occurred after the May 28, 1992 election but before the October 14, 1992 certification. It also denies that there was a legally effective request for bargaining to trigger its statutory obligation and asserts that because there was, in either event, no bargaining obligation, there was no duty to supply the admittedly relevant information.

The General Counsel submits that the Board's unit determination in the representation case was made with full knowledge of all of Respondent's factual contentions and precludes the Respondent from relitigating this "unit issue" in the unfair labor practice proceeding. He also avers that existence of a lawful bargaining demand.

C. Discussions and Conclusions

The principal function of this proceeding, as agreed to by all parties, was Respondent's attempt to test the certification in the above representation matter. It was not made clear to me, at the hearing, why the Board's summary judgment procedure was not utilized and one may speculate that perhaps it was the inclusion of Respondent's refusal to furnish the requested information or the sufficiency of the request to bargain that caused the case to be noticed for hearing.

In any event, the pleadings place in issue the refusal to give information, the existence of a legally sufficient request for bargaining, and, most particularly, the appropriateness of the certified unit.

A. With regard to the existence of the Union's legally sufficient demand for bargaining, denied by Respondent, the only evidence thereof exists in the Union's October 28, 1992 letter to Respondent. Not only does that letter describe the Union as the recipient of "the exclusive" bargaining representative rights for unit employees, but the Union then notified Respondent in the letter that it was "formally requesting the following information in order to enable the parties to enter into a constructive and productive *set of negotiations to reach an acceptable agreement.*" I regard the letter, in sum, as demonstrating that the Union, as the statutory collective-bargaining representative, desired the information so that it could intelligently negotiate an agreement. Although the Union's request for immediate bargaining might arguably have been phrased with greater clarity, I conclude that the Union's letter puts Respondent on notice that the Union, as the certified representative, wanted the information to pursue bargaining for a collective-bargaining agreement. It has long been held that a valid request to bargain need not be made in any particular form or in *haec verba* so long as the request clearly indicates the desire to negotiate and bargain on behalf of the employees in the appropriate unit. *Hydrolines, Inc.*, 305 NLRB 416 (1991). This is precisely what the Union's letter did. Alternatively, under established Board policy, the filing of the 8(a)(5) refusal-to-bargain charge here was itself tantamount to a valid request for recognition and bargaining. *Sterling Processing Corp.*, 291 NLRB 208, 217 (1988); *Sewanee Coal Operators Assn.*, 162 NLRB 172 (1967), *Roberts Electric Co.*, 227 NLRB 1312, 1319 (1977).

B. With regard to Respondent's failure and refusal to provide the information on unit employees (wages, hours, pensions, etc.) requested by the Union on October 28, 1992, Respondent conceded that the information requested was relevant and, in any event, that its refusal violated Section 8(a)(5) and (1) of the Act.

C. Thus, we reach the question whether Respondent may attack the certification on the basis of the evidence proffered in this proceeding. Respondent conceded that all the evidence to attack the certification, offered in this hearing, had been presented to the Board prior to the Board's September 25, 1992 Order whereby (in its Supplemental Decision and Direction of Election) it overruled Respondent's 90 challenges and directed the opening of the ballots which lead to the October 14, 1992 union certification. Respondent, having conceded that the evidence on which it seeks, in this hearing, to attack the certification, was presented or could have been presented to the Board in the prior representation case, I necessarily am obliged to follow the long-established Board rule: that because all the unit issues raised by Respondent were or could have been litigated in the prior representation proceeding, and because Respondent does not allege newly discovered and previously unavailable evidence or special circumstances arising *after* the certification, it is evident that Respondent is attempting to relitigate issues that were or could have been litigated in the prior presentation case. It is well settled that, in the absence of newly discovered and previously unavailable evidence or special circumstances the Respondent, in an unfair labor practice 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. *Pittsburgh Plate Glass Co. v. NLRB*,

313 U.S. 146, 162 (1941); *Duke University*, 311 NLRB 182 (1993).

In view of Respondent's concession and my determination that Respondent had already presented the proffered information to the Board in the prior representation case on which it would attack the unit, and because the Board has ruled against Respondent and certified the unit; and because Respondent has failed to allege, or sought to prove the existence at the hearing of, any newly discovered and previous unavailable evidence or the presence of special circumstances that would require the Board to reexamine the decision made in the representation proceeding, I conclude that Respondent is bound by the Board's unit determination. I further conclude that its failure and refusal to bargain with the Union, upon the Union's timely request, constitutes as alleged, out a violation of Section 8(a)(5) and (1) of the Act. It also follows, consistent with Respondent's refusal to recognize and bargain with the Union, that, as Respondent conceded, its refusal to furnish to the Union the information requested by the Union on October 28, 1992, regarding the terms and conditions of employment of unit employees also constitutes a further violation of Section 8(a)(5) and (1) of the Act. *Bry-Fern Care Center*, 309 NLRB No. 53 (Oct. 30, 1992). (Not reported in Board volumes).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following unit constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production employees including checkers, packers, pickers, receivers, shelvees, shippers, stock controllers, processing employees, selectors, and warehouse employees employed by the Respondent at its facility located at 10885 Textile Road, Belleville, Michigan; but excluding all office clerical employees, confidential employees, professional employees, customer service employees, computer entry employees, guards and supervisors as defined in the Act.

4. At all times since October 14, 1992, the Union has been the exclusive collective-bargaining representative of all employees in the above appropriate unit.
5. By refusing, since October 28, 1992, to recognize and engage in collective bargaining with the Union as the exclusive representative of the employees in the above-described appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
6. By refusing on and after October 28, 1992, to furnish the Union requested relevant information concerning unit employees, 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.
7. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist, to bargain on request with the Union, to furnish all relevant requested information concerning the wages, hours, and terms and conditions of employment of unit employees 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, I shall recommend that the Board construe the initial period of the certification as beginning the date the Respondent commences to meet and bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Outboard Marine Corp.*, 307 NLRB 1333 (1992).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Spring Arbor Distribution Company, Bellevue, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit and refusing to furnish the Union information that is relevant and necessary to its role as exclusive bargaining representative of the following unit employees:

All full-time and regular part-time production employees including checkers, packers, pickers, receivers, shelvees, shippers, stock controllers, processing employees, selectors, and warehouse employees employed by the Respondent at its facility located at 10885 Textile road, Belleville, Michigan; but excluding all office clerical employees, confidential employees, professional employees, customer service employees, computer entry employees, 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 by Section 7 of the Act.

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

(a) Recognize and bargain in good faith with the Union as the exclusive representative of its employees in the above-described unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Forthwith furnish to the Union information requested by it on October 28, 1992, and all further information that is relevant and necessary to the Union's role as the exclusive representative of the unit employees.

(c) Treat the initial year of certification as beginning on the date this Order is complied with.

(d) Post at its facilities in Belleville, Michigan, copies of the attached notice marked "Appendix."³ Copies of the notice on forms provided by the Regional Director for Region 7 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 places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that notices are not altered, defaced, or covered by any other material.

(e) By certified mail, mail notices of the above appendix to all employees on layoff status from Respondent's Belleville, Michigan facility on May 28, 1992.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

³If 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 with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO as the exclusive representative of the employees in the below-described appropriate bargaining unit and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as exclusive bargaining representative of the unit employees.

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 following appropriate bargaining unit:

All full-time and regular part-time production employees including checkers, packers, pickers, receivers, shelvees, shippers, stock controllers, processing employees, selectors, and warehouse employees employed by us at our facility located at 10885 Textile Road, Belleville, Michigan; but excluding all office clerical employees, confidential employees, professional employees, customer service employees, computer entry employees, guards and supervisors as defined in the Act.

WE WILL forthwith furnish to the Union the information requested by it on October 28, 1992, and all further informa-

tion that is relevant and necessary to the Union's role as the exclusive representative of the unit employees.

SPRING ARBOR DISTRIBUTION COMPANY