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President Container, Inc. and Local Union Nos. 825, 825A, 825B, 825C, 825D, 825R, and 825H, International Union of Operating Engineers, AFL-CIO.¹ Case 22-CA-20240(1)

January 9, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

Upon a charge filed on October 25, 1994, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on November 1, 1994, 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 22-RC-10936. (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).) On November 16 and 23, 1994, the Respondent filed an answer and amended answer, respectively, admitting in part and denying in part the allegations in the complaint, and asserting certain affirmative defenses.

On November 22, 1994, the General Counsel filed a Motion for Summary Judgment and memorandum in support thereof. On November 29, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. Thereafter, on December 8, 1994, the General Counsel filed a supplemental memorandum in support of the motion, and on December 22, 1994, the Respondent filed an opposition.

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

Ruling on Motion for Summary Judgment

The Respondent in its amended answer and opposition admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding. In addition, the Respondent asserts as an affirmative defense

¹ The name of the Union appears here as set forth in the Decision and Direction of Election and the Certification of Representative issued by the Regional Director in the underlying representation proceeding. Although the complaint and Motion for Summary Judgment substitute "Local 825RH" for "Local 825H," we assume, in the absence of any indication otherwise, that this was an inadvertent clerical error.

that it has been advised that a majority of the unit employees do not wish to be represented by the Union.

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).

As for the Respondent's assertion that the Union no longer enjoys majority support in the unit, even if true, this would not justify the Respondent's refusal to recognize and bargain with the Union during the certification year. See *Ray Brooks v. NLRB*, 348 U.S. 96 (1954).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, a corporation, with an office and place of business in Moonachie, New Jersey, has been engaged in the manufacture of corrugated products.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, sold and shipped from its Moonachie, New Jersey facility products, goods, and materials valued in excess of \$50,000 directly to points located outside the State of New Jersey. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(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.²

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held September 1, 1994, the Union was certified on September 9, 1994, as the collective-bargaining representative of the employees in the following appropriate unit:

² Although the Respondent's amended answer to the complaint denies knowledge or information sufficient to form a belief whether the Union is a 2(5) labor organization, the Decision and Direction of Election indicates that the Respondent stipulated thereto in the underlying representation proceeding. Accordingly, we find that the Respondent is precluded from now litigating the matter in this proceeding. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992); and *Wickes Furniture*, 261 NLRB 1062, 1063 fn. 4 (1982).

All full-time and regular part-time maintenance mechanics, boiler men and garage mechanics employed by Respondent at its Moonachie, New Jersey facility, but excluding all production employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.³

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

B. Refusal to Bargain

Since about October 14, 1994, the Union has requested the Respondent to bargain, and, since about October 17, 1994, 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.

CONCLUSION OF LAW

By refusing on and after October 17, 1994, 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, President Container, Inc., Moonachie, New Jersey, its officers, agents, successors, and assigns, shall

³The unit is described here as described in the Decision and Direction of Election and the Certification of Representative issued by the Regional Director in the underlying representation proceeding. Although both the complaint and the Motion for Summary Judgment describe the unit somewhat differently, as with the Union's name (see fn. 1, supra), we assume, in the absence of any indication otherwise, that this was an inadvertent clerical error.

1. Cease and desist from

(a) Refusing to bargain with Local Union Nos. 825, 825A, 825B, 825C, 825D, 825R, and 825H, International Union of Operating Engineers, 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 full-time and regular part-time maintenance mechanics, boiler men and garage mechanics employed by Respondent at its Moonachie, New Jersey facility, but excluding all production employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) Post at its facility in Moonachie, New Jersey, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 22 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.

Dated, Washington, D.C. January 9, 1995

William B. Gould IV, Chairman

James M. Stephens, Member

Margaret A. Browning, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁴If 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 Union Nos. 825, 825A, 825B, 825C, 825D, 825R, and 825H, International Union of Operating Engineers, 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 and regular part-time maintenance mechanics, boiler men and garage mechanics employed by us at our Moonachie, New Jersey facility, but excluding all production employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

PRESIDENT CONTAINER, INC.