

K-Mart d/b/a Super K-Mart and United Food and Commercial Workers Union, Local 120, AFL-CIO. Case 32-CA-15629

November 22, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

Pursuant to a charge and an amended charge filed by United Food and Commercial Workers Union, Local 120, AFL-CIO, the Union, on August 20 and 22, 1996, respectively, the General Counsel of the National Labor Relations Board issued a complaint on September 13, 1996, 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 and to furnish necessary and relevant information following the Union's certification in Case 32-RC-4153. (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 an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On October 7, 1996, the General Counsel filed a Motion for Summary Judgment. On October 9, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On October 16, 1996, the Union filed a response in support of the General Counsel's Motion for Summary Judgment. On November 6, 1996, the Respondent filed a response opposing the Motion for Summary Judgment.

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 and response, the Respondent admits its refusal to bargain and to furnish information, but attacks the validity of the certification on the basis of its arguments in support of its contention in the representation proceeding that the unit is inappropriate. In addition, the Respondent asserts that circumstances within the unit have changed since the representation hearing and certification rendering the legal basis for the certification no longer valid. Finally, the Respondent in its answer denies that the information requested by the Union is necessary and relevant to the Union's role as the exclusive bargaining representative.¹

¹ In its answer, the Respondent also asserts as affirmative defenses that the complaint is barred by the equitable doctrines of laches, estoppel, and unclean hands. In neither its answer nor its response, however, does the Respondent explain how or why these doctrines

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. Although the Respondent asserts in its answer that circumstances in the unit have changed rendering the legal basis for the certification no longer valid, the only change since the representation hearing and certification cited in its response is that the number of skilled employees engaged in meatcutting is currently 3 of 11 unit employees (or 27 percent), rather than 4-5 of 16 (or 25-31 percent) at the time of the certification.² Further, the Respondent does not explain how this change came about. If the change was the result of unilateral actions by the Respondent, it would normally not be a basis for reconsidering the certification in the instant refusal-to-bargain proceeding.³ In any event, even assuming that it was not such a unilateral change or that it could otherwise properly be considered, we find that the change does not warrant reconsideration of the certification in this case. 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).

We also find that there are no issues warranting a hearing with respect to the Union's request for information. The complaint alleges, and the Respondent's

have any relevance to this proceeding or excuse its admitted refusal to bargain and to furnish information. Indeed, the Respondent does not even mention these defenses in its response. In these circumstances, we find that the foregoing affirmative defenses are insufficient to warrant a hearing or denial of the Motion for Summary Judgment. Cf. *Circus Circus Hotel*, 316 NLRB 1235 fn. 1 (1995).

² The Respondent also notes that the number of meatwrappers is currently reduced from three to two, and the number of customer service associates is currently reduced from six to five. However, the Respondent does not appear to rely on these changes as support for its contention that the unit is inappropriate.

³ See generally *Richardson Engineering Co.*, 248 NLRB 702, 703 fn. 4 (1980), and *Highland Terrace Convalescent Center*, 233 NLRB 87, 88 (1977). See also *East Michigan Care Corp.*, 246 NLRB 458, 460 fn. 4 (1979). Although the Board in *Frito Lay, Inc.*, 177 NLRB 820 (1969), dismissed a refusal-to-bargain complaint and vacated a prior certification based on changed circumstances affecting the appropriateness of the unit, it did so because the "essential factor" upon which the Board had based its earlier unit determination was eliminated due to the employer's reorganization of its operations—a reorganization which had been in the planning stage prior to the commencement of the representation proceeding. Here, the number of unit employees engaged in meatcutting was one of several factors considered by the Regional Director and Board in determining that a separate meat department unit was appropriate, and the Respondent has not contended that the current reduction in such employees is the result of a permanent reorganization of its operations, previously planned or otherwise. Rather, the Respondent merely contends that the number has "dwindled" since the certification.

answer admits, that the Union requested the following information on September 9, 1996:

1. A list of current employees including their names, dates of hire, rates of pay, job classification, last known address, phone number, date of completion of any probationary period, and employee number;
2. A copy of all current company personnel policies, practices and procedures.
3. A copy of all payroll and wage practices, policies or procedures.
4. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock purchase, incentive, vacation, health and welfare, apprenticeship, training, legal services, child care or any other plans which relate to the employees. (Included in this request would be all summary plan descriptions, and the plan itself);
5. Copies of all current job descriptions;
6. Copies of any company wage or salary plans;
7. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year;
8. A copy of all rules affecting the working conditions of the employees.

Although the Respondent's answer denies that this information is relevant and necessary to the Union's duties as the exclusive bargaining representative, it is well established that such information is presumptively relevant and must be furnished on request. See, e.g., *Maple View Manor*, 320 NLRB 1149 (1996); *Masonic Hall*, 261 NLRB 436 (1982), and *Mobay Chemical Corp.*, 233 NLRB 109 (1977).

Accordingly, we grant the Motion for Summary Judgment. On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, the Respondent, a Michigan corporation with an office and place of business in Oakland, California, has been engaged in the retail sale of general merchandise and related products. During the 12-month period preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000 and purchased and received goods valued in excess of \$5000 which originated outside the State of California.

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 August 1, 1996, the Union was certified on August 16, 1996, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full time and regular part-time meat and seafood department employees employed by Respondent at its 4000 Alameda Avenue, Oakland, California store; excluding all other 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 August 14 and September 9, 1996, respectively, the Union has requested the Respondent to bargain and to furnish information, and since August 19 and September 10, 1996, respectively, the Respondent has refused. We find that these refusals constitute 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 August 19, 1996, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, and on and after September 10, 1996, to furnish the Union requested necessary and relevant information, 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 by refusing to bargain with the Union, 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 the 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). Finally, we shall also order the Respondent to furnish

the Union the information it requested on September 9, 1996.⁴

ORDER

The National Labor Relations Board orders that the Respondent, K-Mart d/b/a Super K-Mart, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers Union, Local 120, 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 the exclusive bargaining representative of the unit employees.

(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 meat and seafood department employees employed by Respondent at its 4000 Alameda Avenue, Oakland, California store; excluding all other employees, guards, and supervisors as defined in the Act.

(b) Furnish the Union the information that it requested on September 9, 1996.

(c) Within 14 days after service by the Region, post at its facility in Oakland, California, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by the Respondent's au-

⁴In its response to the Notice to Show Cause, the Union requests that the Respondent also be ordered to provide any other information the Union would request which is relevant to bargaining to a date at least 1 year preceding the date of certification. In addition, the Union requests that the Board award attorneys' fees. We deny both requests. With respect to the former request, the Union cites no supporting basis or case authority for such an affirmative order, and we are aware of none. Moreover, the standard cease-and-desist provision which we have included in the Order should be sufficient to require the Respondent to comply with any future union requests for necessary and relevant information. As for the latter request for attorneys' fees, we deny it as lacking in merit on the ground that the Respondent's position regarding the certification was not frivolous within the meaning of *Frontier Hotel & Casino*, 318 NLRB 857 (1995).

⁵If 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."

thorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 20, 1996.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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 120, AFL-CIO, as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the 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 bargaining unit:

All full time and regular part-time meat and seafood department employees employed by us at our 4000 Alameda Avenue, Oakland, California store; excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL furnish the Union with the information that it requested on September 9, 1996.

K-MART D/B/A SUPER K-MART