Lyric Opera of Chicago *and* American Guild of Musical Artists. Case 13–CA–34622

January 16, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

Pursuant to a charge filed on October 2, 1996, the General Counsel of the National Labor Relations Board issued a Complaint and Notice of Hearing on October 16, 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 following the Union's certification in Case 13–RC–19255.[1] (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 November 20, 1996, the General Counsel filed a Motion to Transfer Proceedings to the Board and Motion for Summary Judgment. On November 22, 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 December 19, 1996, 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 and response the Respondent admits its refusal to bargain but attacks the validity of the certification based on its contentions 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.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a not-for-profit corporation, with its office and place of business in Chicago, Illinois, has been engaged in the business of performing grand opera. During the calendar year preceding issuance of the complaint, the Respondent, in conducting its business operations, derived gross revenues in excess of $1 million and purchased and received at its Chicago, Illinois facility goods and materials valued in excess of $50,000 directly from points outside the State of Illinois.

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.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held March 30, 1996, the Union was certified on August 30, 1996, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All employees who perform non-speaking, non-singing, non-dancing roles on stage in theatrical productions employed by the Employer at its Chicago, Illinois facility; but excluding office clerical employees, guards and supervisors as defined by the Act, all other employees, and all supernumeraries who are paid on a per call expense basis.

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

B. *Refusal to Bargain*

About August 21 and September 9, 1996, the Union requested the Respondent to bargain, and, about September 16 and October 7, 1996, the Respondent refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

[1] By order dated January 31, 1996, the General Counsel transferred the case from Region 13 to Region 19 as Case 19–RC–13164. The order provided that on issuance of the decision by the Regional Director for Region 19, the case would automatically transfer back to and continue in Region 13 as Case 13–RC–19255.

[2] In its response, the Respondent asserts that there are relevant factual issues that remain unresolved regarding the issues in the representation proceeding, and that because the Respondent is raising these factual issues in its response, summary judgment is precluded under Sec. 102.24 of the Board's rules. However, it is clear that all of the factual issues raised by the Respondent were or could have been litigated in the representation proceeding. Thus, as indicated above, they are not properly litigable in the instant "technical" refusal to bargain proceeding, and do not preclude summary judgment.

CONCLUSION OF LAW

By refusing on and after September 16, 1996, 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 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).

ORDER

The National Labor Relations Board orders that the Respondent, Lyric Opera of Chicago, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with American Guild of Musical Artists 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 employees who perform non-speaking, non-singing, non-dancing roles on stage in theatrical productions employed by the Employer at its Chicago, Illinois facility; but excluding office clerical employees, guards and supervisors as defined by the Act, all other employees, and all supernumeraries who are paid on a per call expense basis.

(b) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 13 after being signed by the Respondent's authorized 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 October 2, 1996.

(c) 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.

[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."

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 the American Guild of Musical Artists 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 employees who perform non-speaking, non-singing, non-dancing roles on stage in theatrical productions employed by us at our Chicago, Illinois facility; but excluding office clerical employees, guards and supervisors as defined by the Act, all other employees, and all supernumeraries who are paid on a per call expense basis.

LYRIC OPERA OF CHICAGO