

**Mulvaney Mechanical, Inc. and Local Union 38, Sheet Metal Workers' International Association, AFL-CIO.** Case 34-CA-8640

May 6, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

Pursuant to a charge filed on December 29, 1998, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on February 10, 1999, 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 34-RC-1517. (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 March 26, 1999, the General Counsel filed a Motion for Summary Judgment and a Memorandum in Support. On March 30, 1999, 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 denies that it has refused to bargain and attacks the validity of the certification on the basis of the Board's resolution of challenged ballots in the representation proceeding.<sup>1</sup> The Respondent argued that the challenged voters were not eligible to vote and that the Union, therefore, did not receive a majority vote of valid ballots cast in the election upon which the Board based its certification.

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 un-

<sup>1</sup> The Respondent's answer denies par. 7 of the complaint which sets forth the appropriate unit. We find that the Respondent's denial in this respect does not raise any litigable issue in this proceeding. Under the Board's Rules, the Respondent had the opportunity to litigate the unit issue in the representation proceeding. The Respondent, however, chose not to do so, and instead entered into a Stipulated Election Agreement which, inter alia, set forth the appropriate collective-bargaining unit. By entering into this stipulation, the Respondent agreed that the unit described therein was appropriate. Accordingly, we find that the appropriate unit is as stated in the complaint.

fair 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

At all material times, the Respondent, a Connecticut corporation, with a principal office and place of business located in Ridgefield, Connecticut, has been engaged in the construction business as a sheet metal contractor.

During the 12-month period ending January 31, 1999, the Respondent, in conducting its operations described above, purchased and received at its Ridgefield facility goods valued in excess of \$50,000 directly from points outside the State of Connecticut.

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 November 20, 1997, the Union was certified on October 14, 1998, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time sheet metal journeymen and apprentices employed by the Respondent out of its 632 Danbury Road, Ridgefield, Connecticut location; but excluding all other employees, office clericals, guards, and professional employees 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*

About December 9, 1998, the Union, by letter, requested the Respondent to bargain, and about December 15, 1998, the Respondent, by letter, refused.<sup>2</sup> We find that this refusal constitutes an unlawful refusal to recognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

<sup>2</sup> We reject the Respondent's contention that it has not refused to bargain. It did not honor the Union's request to meet and bargain, choosing instead to respond with a letter that three times asserted that it had no obligation to bargain or that the Board's certification is invalid. Further, although the Respondent asserts that the Union's bargaining demand is consistent with the Union's attempts to enforce a National Joint Adjustment Board interest arbitration award establishing an Sec. 8(f) collective-bargaining agreement between the Union and the Respondent, the fact remains that the Respondent cannot lawfully refuse to recognize the Union pursuant to the Board's certification pending collateral litigation. See, e.g., *Terrace Gardens Plaza*, 315 NLRB 749 (1994), *enfd.* 91 F.3d 222 (D.C. Cir. 1996); *Bob's Big Boy Family Restaurants*, 264 NLRB 432, 434 (1982).

## CONCLUSION OF LAW

By failing and refusing on and after December 15, 1998, to recognize and 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, Mulvaney Mechanical, Inc., Ridgefield, Connecticut, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Refusing to bargain with Local Union 38, Sheet Metal Workers' International Association, 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 sheet metal journeymen and apprentices employed by the Respondent out of its 632 Danbury Road, Ridgefield, Connecticut location; but excluding all other employees, office clericals, guards, and professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Ridgefield, Connecticut, copies of the at-

tached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 34, 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 December 15, 1998.

(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.

## 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 38, Sheet Metal Workers' International Association, 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 sheet metal journeymen and apprentices employed by us out of our 632 Danbury Road, Ridgefield, Connecticut location; but excluding all other employees, office clericals, guards, and professional employees and supervisors as defined in the Act.

MULVANEY MECHANICAL, INC.

<sup>3</sup> 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."