

**Randell Warehouse of Arizona, Inc. and Sheet Metal Workers' International Association, Local No. 359, AFL-CIO.** Case 28-CA-16040

March 20, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX,  
LIEBMAN, HURTGEN, AND BRAME

Pursuant to a charge filed on September 15, 1999, the General Counsel of the National Labor Relations Board issued a complaint on November 29, 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 28-RC-5274. (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.

On December 20, 1999, the General Counsel filed a Motion for Summary Judgment. On December 23, 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.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of objections alleged to have affected the results of the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.<sup>1</sup> The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special cir-

<sup>1</sup> In its opposition to the General Counsel's Motion for Summary Judgment, the Respondent contends that the Board erred in the underlying representation case by retroactively applying the change in law that resulted from its overruling of *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988). This is an argument that the Respondent could have made in the underlying representation case as an alternative to its argument that the Board should adhere to *Pepsi Cola*. It also could have raised it on a motion for reconsideration of the Board's underlying decision. Hence, we regard the contention as untimely raised. Member Brame relies only on this basis.

In any event, we find no merit in it. As explained in *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994), the Board recognizes a presumption in favor of the retroactivity of new rulings in representation cases. We see no circumstances in this case that would overcome that presumption. Pursuant to our view of the law set out in the underlying case, the election in which the employees expressed their choice concerning union representation was a fair one; and it serves an important statutory purpose to honor that choice. Further, we see no prejudice to the Respondent. Since no conduct of the Respondent was at issue in the election objection in question, the Respondent cannot reasonably argue that it had detrimentally relied on Board law in taking, or failing to take, any particular action; and it has no legitimate interest in frustrating employee choice registered in a valid election.

cumstances 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.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation duly organized under, and existing by virtue of, the laws of the State of Delaware. At all material times the Respondent has maintained an office and place of business at 5901 South Belvadere, Tucson, Arizona, where it is engaged in business as a manufacturer of commercial food service equipment.

During the 12-month period ending September 15, 1999, the Respondent, in the course and conduct of its business operations described above, purchased and received at its facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Arizona.

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 February 3, 1995, the Union was certified on July 27, 1999,<sup>2</sup> as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All probationary employees beginning ninety (90) consecutive calendar days after being hired by the Respondent and all regular employees who are assemblers, janitors, hourly maintenance, shippers and craters, stampers and shearers and warehouse persons employed by the Respondent in Tucson, Arizona; excluding all supervisors, employees occupying positions of a labor relations confidential nature, salaried employees, temporary employees, employees designated as managerial trainees, secretaries and office clerical employees, guards, managers, administrators and executives.

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

B. *Refusal to Bargain*

On or about September 1, 1999, the Union, by certified letter to the Respondent, requested the Respondent to

<sup>2</sup> 328 NLRB 1034 (1999). Member Brame concurred in the result. Member Hurtgen dissented from the issuance of the certification but he agrees that the Respondent has raised nothing new in this proceeding and for institutional reasons, therefore, he concurs in this decision.

recognize and bargain and on or about September 8, 1999, the Respondent, by letter to the Union, 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 failing and refusing on and after September 8, 1999, 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, Randell Warehouse of Arizona, Inc., Tucson, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Sheet Metal Workers' International Association, Local No. 359, 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 probationary employees beginning ninety (90) consecutive calendar days after being hired by the Respondent and all regular employees who are assemblers, janitors, hourly maintenance, shippers and craters, stampers and shearers and warehouse persons em-

ployed by the Respondent in Tucson, Arizona; excluding all supervisors, employees occupying positions of a labor relations confidential nature, salaried employees, temporary employees, employees designated as managerial trainees, secretaries and office clerical employees, guards, managers, administrators and executives.

(b) Within 14 days after service by the Region, post at its facility in Tucson, Arizona, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, 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 September 8, 1999.

(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 Sheet Metal Workers' International Association, Local No. 359, 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:

<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."

All probationary employees beginning ninety (90) consecutive calendar days after being hired by us and all regular employees who are assemblers, janitors, hourly maintenance, shippers and craters, stampers and shearers and warehouse persons employed by us in Tucson, Arizona; excluding all supervisors, employees occupying positions of a labor relations confidential nature,

salaried employees, temporary employees, employees designated as managerial trainees, secretaries and office clerical employees, guards, managers, administrators and executives.

RANDELL WAREHOUSE OF ARIZONA, INC.