

**New Jersey Manufacturing Extension Program, Inc.
and Communications Workers of America,
AFL-CIO, Local 1032.** Case 22-CA-25097

August 27, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

This is a refusal-to-bargain case in which the Respondent seeks to contest the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on March 26, 2002, the General Counsel issued the complaint on March 29, 2002, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 22-RC-12144. (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 April 22, 2002, the General Counsel filed a Motion for Summary Judgment. On April 29, 2002, 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 Charging Party filed a statement in support of the General Counsel's motion. The Respondent filed an opposition statement and a cross-motion for summary judgment.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the certification on the basis of its contention, raised and rejected in the representation proceeding, that the certified unit is inappropriate. Specifically, the Respondent renews its argument, rejected by the Regional Director in the representation case, that the field agents who constitute the unit are managerial employees and therefore are not employees covered by the Act.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.¹ The Respondent does not offer to ad-

¹ We note in this regard that the Respondent failed to file a request for review of the Regional Director's Decision and Direction of Election, and did not file objections to the conduct of the election. In these circumstances, the Respondent is precluded under Secs. 102.67(f) of the Board's Rules and Regulations from raising the issue of the appropriateness of the unit in the instant proceeding. See *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921, 922 (1996); *Dyncorp/Dynair Services*, 322 NLRB 602 fn. 1 (1996), enfd. mem. 121 F.3d 698 (4th Cir. 1997). See also *Ritz-Carlton Hotel Co. v. NLRB*, 123 F.3d 760 (3d Cir. 1997), enfg. 321 NLRB 659 (1996); *Premier Living Center*, 331 NLRB 123 (2000). Thus, the Respondent failed to exhaust its administrative

remedies by not requesting Board consideration of the Regional Director's findings. Accordingly, we find no merit in the Respondent's contention that its failure to file a request for review or objections did not waive its right to challenge the appropriateness of the unit in the instant proceeding because the issue of whether the unit employees are managerial involves a jurisdictional question that may be raised at any point in the administrative proceedings. In any event, the Respondent has not raised any new issues in this "technical" 8(a)(5) proceeding warranting a hearing or a reconsideration of the findings in the representation case.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New Jersey not-for-profit corporation, with an office and place of business in Newark, New Jersey, has been engaged in providing consulting services to manufacturers from its Newark, New Jersey facility.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, purchased and received at its Newark, New Jersey facility goods and supplies valued in excess of \$50,000 directly from suppliers 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.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held January 2, 2002, the Union was certified on January 16, 2002, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full and regular part-time Field Agents employed by the Employer from its Newark, New Jersey location, excluding all other employees, guards and supervisors as defined in the Act.³

remedies by not requesting Board consideration of the Regional Director's findings. Accordingly, we find no merit in the Respondent's contention that its failure to file a request for review or objections did not waive its right to challenge the appropriateness of the unit in the instant proceeding because the issue of whether the unit employees are managerial involves a jurisdictional question that may be raised at any point in the administrative proceedings. In any event, the Respondent has not raised any new issues in this "technical" 8(a)(5) proceeding warranting a hearing or a reconsideration of the findings in the representation case.

² The Respondent's cross-motion for summary judgment is therefore denied.

³ The unit description set forth in the complaint contained minor errors that did not precisely describe the certified unit.

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

B. Refusal to Bargain

About February 1, 2002, the Union, by letter, requested the Respondent to bargain, and, since about March 5, 2002, the Respondent has failed and refused. We find that this failure and 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 March 5, 2002, 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, New Jersey Manufacturing Extension Program, Inc., Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Communications Workers of America, AFL-CIO, Local 1032 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 and regular part-time Field Agents employed by the Employer from its Newark, New Jersey location, excluding all other employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Newark, 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 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 March 5, 2002.

(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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection

⁴ 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."

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Communications Workers of America, AFL-CIO, Local 1032 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 and regular part-time Field Agents employed by us from our Newark, New Jersey location, excluding all other employees, guards and supervisors as defined in the Act.

NEW JERSEY MANUFACTURING EXTENSION
PROGRAM, INC.