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The Lamar Company, LLC d/b/a Lamar Advertising of Janesville and International Union of Painters and Allied Trades, District Council No. 7, AFL-CIO. Case 30-CA-16706-1

April 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on January 27, 2004, the General Counsel issued the complaint on February 25, 2004, 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 30-RC-6254. (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 16, 2004, the General Counsel filed a Motion for Summary Judgment. On March 19, 2004, 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 April 2, 2004, the Respondent filed a response. On April 20, 2004, the General Counsel filed a reply to the Respondent's response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its objections to the election 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.¹ We

¹ Our decision in the underlying representation proceeding is reported at 340 NLRB No. 114 (2003). In its answer and response to the notice to show cause, the Respondent contends that we should recon-

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, a limited liability company, has been engaged in the business of outdoor advertising at its Janesville, Wisconsin facility. During the calendar year preceding issuance of the complaint, the Respondent, in conducting its operations above, sold and shipped goods and materials valued in excess of \$50,000 directly to customers located outside the State of Wisconsin. We find that the Respondent is an employer engaged in

sider that decision in light of the new standard subsequently advocated by two of the four Board Members who participated in *Accubilt, Inc.*, 340 NLRB No. 161 (2003). In that case, Chairman Battista and Member Schaumber noted that they

would set aside an election in circumstances where the "critical period" misconduct of the third party affected a determinative number of voters, even if that conduct did not "create a general atmosphere of fear and reprisal" [the prevailing third-party standard under *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984)].

Slip op. at 3, fn. 6. Here, the only third-party conduct involved alleged threats made by prounion employees against employee Jason Dygart (Respondent's Objections 3 and 4). We addressed that alleged conduct in detail in our decision in the representation proceeding. We noted that the Respondent did not contend that the threat to Dygart created a "general atmosphere of fear and reprisal," but relied instead on its argument, which we rejected, that one of the prounion employees was a union agent. We stated that "arguably, our inquiry could end here." Nevertheless, we further found that "even assuming, however, that the proper focus of inquiry is on the threat in relation to Dygart alone—given that a one-vote switch could have changed the outcome of the election—we do not find the conduct objectionable." Specifically, we found that the record did not show that "under all the circumstances, a reasonable employee in Dygart's position would have been put in fear by the threat." 340 NLRB No. 114, slip op. at 3. In short, we fully considered and addressed in our prior decision whether the third party conduct here warranted a new election because of its impact on a determinative number of voters, even though it did not "create a general atmosphere of fear and reprisal." Further, the Respondent has not offered any newly discovered and previously unavailable evidence with respect to that issue. Accordingly, we deny the Respondent's request for reconsideration.

Member Schaumber notes that while he and the Chairman, in the underlying representation proceeding here, did cite to *Westwood Horizons Hotel* and its standard (that elections based on third-party threats will be set aside only if the conduct was so aggravated as to create a general atmosphere of fear and reprisal), they nonetheless conducted an analysis, summarized above, in the underlying representation proceeding (See 340 NLRB No. 114, slip op. 3-4) which presaged their later position in *Accubilt* and which fully took into account the considerations they articulated in *Accubilt*. Accordingly, Respondent's request for reconsideration is appropriately denied.

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 5, 2001, the Union was certified on October 31, 2003, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time construction employees, electricians, billposters, sign painter-artists, sign erectors and brushcutters employed by the Employer at or out of its 5101 Highway 51 South, Janesville, Wisconsin facility; excluding all office employees, clerical employees, sales employees, charting manager, managerial employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

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

B. *Refusal to Bargain*

On December 22, 2003, the Union requested the Respondent to bargain. The Respondent, however, refused to do so. We find that the Respondent has thereby unlawfully failed and refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing 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, The Lamar Company, LLC d/b/a Lamar Advertising of Janesville, Janesville, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union of Painters and Allied Trades, District Council No. 7, 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 construction employees, electricians, billposters, sign painter-artists, sign erectors and brushcutters employed by the Employer at or out of its 5101 Highway 51 South, Janesville, Wisconsin facility; excluding all office employees, clerical employees, sales employees, charting manager, managerial employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Janesville, Wisconsin, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 30, 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

² 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."

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 22, 2003.

(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.

Dated, Washington, D.C. April 30, 2004

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Union of Painters and Allied Trades, District Council No. 7, 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 following bargaining unit:

All full-time and regular part-time construction employees, electricians, billposters, sign painter-artists, sign erectors and brushcutters employed by the Employer at or out of its 5101 Highway 51 South, Janesville, Wisconsin facility; excluding all office employees, clerical employees, sales employees, charting manager, managerial employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

THE LAMAR COMPANY, LLC D/B/A LAMAR ADVERTISING OF JANESVILLE