Wickes Furniture, A Division of the Wickes Corporation *and* United Steelworkers of America, AFL-CIO-CLC. Case 6-CA-14989

May 25, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on October 13, 1981, by United Steelworkers of America, AFL-CIO-CLC, herein called the Union, and duly served on Wickes Furniture, A Division of the Wickes Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 6, issued a complaint on November 12, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 14, 1981, following a Board election in Case 6-RC-8864, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about October 4, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 23, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 16, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 22, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to General Counsel's Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent denies that the Union has requested bargaining, and that it has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in an appropriate unit. However, counsel for the General Counsel has submitted as Exhibit A, attached to the Motion for Summary Judgment, a letter from the Union to Respondent, dated September 22, 1981, in which the Union requested Respondent to bargain in the unit stipulated to be appropriate in Case 6-RC-8864. Counsel for the General Counsel has also attached as Exhibit B a letter from Respondent to the Union, dated October 19, 1981, in which Respondent takes the position that, because the Board's certification of the Union was improper, it will "pursue this issue further through legal channels." In its response to the General Counsel's Motion for Summary Judgment, Respondent does not dispute the authenticity of these letters, nor does it contend that a factual issue has been raised regarding the request and refusal to bargain. Respondent argues instead that it is free to relitigate issues raised in the representation proceeding because the section of the Board's Rules and Regulations relied on by the General Counsel is not controlling in this case. Respondent further contends that recent decisions of the Supreme Court and Seventh Circuit Court of Appeals require reconsideration of the Hearing Officer's credibility resolutions and his determination that employee Katherine Smith is a confidential employee.

Review of the record herein, including the record in Case 6-RC-8864, reveals that an election conducted pursuant to a Stipulation for Certification Upon Consent Election on November 24, 1980, resulted in a vote of 31 for, and 29 against, the Union, with 3 determinative challenged ballots. Thereafter, Respondent filed timely objections to the election, and the Regional Director directed a Hearing on Objections and Challenged Ballots. At the commencement of the hearing, however, Respondent moved to withdraw its objections to the election. The Hearing Officer granted this motion. Following the close of the hearing, the Hearing Officer issued his Report on Objections and Challenges, in which he recommended that two of the challenges be sustained and, as the third ballot was

[1] Official notice is taken of the record in the representation proceeding, Case 6-RC-8864, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

no longer determinative of the election's results, that a certification of representative be issued. In so recommending, the Hearing Officer found that challenged voter Katherine Smith was a confidential employee and should be excluded from the unit. Thereafter, Respondent filed exceptions to the Hearing Officer's report in which it set forth various arguments for its contention that the Hearing Officer erred in sustaining the challenge to Katherine Smith's ballot. On September 14, 1981, the Board, having considered the Hearing Officer's report, the Employer's exceptions thereto, and the entire record, adopted the findings and recommendations of the Hearing Officer, as modified, and certified the Union as the exclusive bargaining agent of the employees in the unit stipulated to be appropriate.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence. Respondent's allegation that special circumstances exist herein which require the Board to reexamine the decision made in the representation proceeding is without merit.[3] We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Wickes Furniture, A Division of the Wickes Corporation, a Delaware corporation with a facility located in Coraopolis, Pennsylvania, is engaged in the operation of a chain of retail furniture stores. During the 12-month period ending August 31, 1981, Respondent, in the course and conduct of its operations at its Coraopolis facility derived gross revenues in excess of $500,000. During this same period Respondent purchased and received at its Coraopolis facility products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.[4]

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time office clerical, sales, warehouse and repairmen employees

[2] In this proceeding Respondent notes that the General Counsel relies on Sec. 102.67(f) of the Board's Rules and Regulations, Series 8, as amended, in support of the proposition that Respondent is precluded from relitigating issues which were or could have been litigated in a prior representation proceeding. That section, by its terms, applies to requests for review of regional directors' decisions, and provides that the denial of such a request for review will preclude relitigation in any related subsequent unfair labor practice of any issues that were or could have been raised in the representation proceeding. Respondent argues that since the General Counsel cites Sec. 102.67(f) in his Motion for Summary Judgment, and since that section is not controlling here, because in this proceeding the Board, rather than the Regional Director, issued a decision, that a hearing should therefore be held on the unfair labor practice complaint. We disagree. Although Respondent is correct that Sec. 102.67(f) is not applicable in this case, the policy considerations which bar such relitigation apply with equal force whether the representation proceeding involves a decision made in the first instance by the Board, a regional director's decision which the Board has declined to review, a regional director's report which the Board has adopted, or, as here, a hearing officer's report which the Board has adopted. See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941).

[3] Respondent contends that cases decided by the Supreme Court and by the Seventh Circuit Court of Appeals subsequent to our earlier decision in this case constitute such special circumstances. We disagree. In *N.L.R.B.* v. *Hendricks County Rural Electric Membership Corporation*, 108 LRRM 3105, 92 LC ¶ 13,098 (1981), the Court approved the Board's use of the "labor nexus test" in determining whether an employee comes within the category of "confidential employee." This test was properly applied by the Hearing Officer, who expressly found that employee Smith "assists Store Manager Vargo in a confidential capacity with respect to his involvement in labor relations matters." In *Edward Kopack* v. *N.L.R.B.*, 668 F.2d 946 (1982), the Seventh Circuit found no merit in the contention that the Board had improperly dismissed certain 8(a)(3) allegations. The court offered no criticism of the Board's policy against overruling a hearing officer's credibility resolutions unless the clear preponderance of all relevant evidence convinces us that the resolutions were incorrect. Accordingly, we reject Respondent's contention that these cases raise special circumstances requiring the Board to reexamine its decision in the underlying representation case.

[4] In its answer to the complaint, Respondent averred that it was "without knowledge or information sufficient to form a belief as to" whether United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Sec. 2(5) of the Act. We note that Respondent failed to raise this issue in the underlying representation case, and thus is precluded from litigating the matter in this proceeding. See fn. 2, *supra*. Moreover, we take administrative notice of the fact that United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Sec. 2(5) of the Act.

employed by the Employer at its Coraopolis, Pennsylvania, facility; excluding guards, professional employees and supervisors as defined in the Act.[5]

2. The certification

On November 24, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 6, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on September 14, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 22, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 4, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.[6]

Accordingly, we find that Respondent has, since October 4, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Wickes Furniture, A Division of the Wickes Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time office clerical, sales, warehouse and repairmen employees employed by the Employer at its Coraopolis, Pennsylvania, facility; excluding guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 14, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 4, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclu-

[5] In its answer to the complaint, Respondent denies that the above-described unit is appropriate for the purpose of collective bargaining within the meaning of Sec. 9(b) of the Act. We note, however, that in Case 6-RC-8864 Respondent stipulated to the appropriateness of this unit.

[6] In its October 19, 1981, letter to the Union, Respondent clearly refused to bargain, indicating that it considered the Board's certification of the Union improper. Respondent also stated therein that "This letter will confirm our telephone conversation relative to bargaining with the Steelworkers Union." We are satisfied from a reading of this letter, and Respondent's admission that it received a telephone call from the Union's assistant general counsel on October 4, 1981, that the letter merely confirmed Respondent's earlier refusal to bargain which occurred on October 4, 1981.

sive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Wickes Furniture, A Division of the Wickes Corporation, Coraopolis, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Steelworkers of America, AFL-CIO-CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time office clerical, sales, warehouse and repairmen employees employed by the Employer at its Coraopolis, Pennsylvania, facility; excluding guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Coraopolis, Pennsylvania, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7] In the event that 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

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Steelworkers of America, AFL-CIO-CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time office clerical, sales, warehouse and repairmen employees employed by us at out Coraopolis, Pennsylvania facility; excluding guards, professional employees and supervisors as defined in the Act.

WICKES FURNITURE, A DIVISION OF
THE WICKES CORPORATION