Benchmark Industries, Inc. *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC. Case 26-CA-9491

June 17, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on December 21, 1981, by Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, herein called the Union, and duly served on Benchmark Industries, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 26, issued a complaint on December 30, 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 June 22, 1981, following a Board election in Case 26-RC-6356,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about June 29, 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 January 7, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On January 22, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, and Respondent filed a brief in opposition thereto. Subsequently, on January 28, 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. Thereafter, the General Counsel filed a response to Respondent's opposition brief.

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 and in its opposition to the Motion for Summary Judgment, Respondent admits that it has refused to bargain with the Union but denies that it has thereby violated the Act. Respondent affirmatively states that the Union's certification in Case 26-RC-6356 was improper, that a hearing should be held to receive evidence on the issues of the appropriate unit and the objections to the election held in the representation proceeding, that Respondent had no duty to bargain with the Union while its motion for reconsideration of the Board's postelection denial of review was still pending, and, finally, that the Regional Director erred in his disposition of the postelection objections by failing to transmit copies of all affidavits and other investigatory evidence to the Board for consideration as part of the record on Respondent's request for review.

The General Counsel contends that Respondent improperly seeks to litigate issues which were or could have been litigated in the underlying representation proceeding or which have no merit. We agree with the General Counsel.

A review of the record herein, including that of the representation proceeding in Case 26-RC-6356, establishes that a petition was filed by the Union on March 19, 1981, seeking an election among a unit of production and maintenance workers employed by the Employer, excluding all office clericals, professional employees, guards and/or watchmen and supervisors as defined in the Act. On April 15, 1981, the Acting Regional Director for Region 26 issued his Decision and Direction of Election, in which he designated the appropriate unit to be all production and maintenance employees at the Employer's Burnsville, Mississippi, location, including production employees, repair employees, shipping employees, timeworker employees, bundle worker employees, quality control employees, the regular part-time shipping employees, mechanics, and janitors; excluding office clerical employees, guards and supervisors as defined in the Act. Thereafter, on April 27, 1981, Respondent filed with the Board a request for review of the Acting Regional Director's decision, alleging that the Acting Regional Director erred in including quality control workers

[1] Official notice is taken of the record in the representation proceeding, Case 26-RC-6356, 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.

and mechanics in the appropriate unit. On May 14, 1981, the Board denied the request for review. On May 15, 1981, the Board conducted a secret-ballot election in which the Union received a majority of the votes cast.

On May 21, 1981, Respondent filed timely objections to conduct affecting the results of the election. On June 22, 1981, the Regional Director issued a supplemental decision overruling the objections in their entirety and certifying the Union as the exclusive bargaining representative in the unit found appropriate. On July 6, 1981, Respondent filed a request for review of the supplemental decision and certification of representative. On November 9, 1981, the Board denied the request. On December 4, 1981, Respondent filed a motion for reconsideration which the Board denied on January 12, 1982. Since June 29, 1981, Respondent has refused to bargain with the Union. Subsequent to a charge filed by the Union on December 21, 1981, the Regional Director issued a complaint on December 30, 1981, alleging violations of Section 8(a)(1) and (5) of the Act.

In its opposition to the Motion for Summary Judgment, Respondent asserts that it did not refuse to bargain with the Union but rather declined to negotiate while its request for review was pending. The General Counsel correctly notes, however, that Respondent's answer to the complaint admits the allegations that Respondent has failed to and refused to recognize and bargain with the Union. In any event, it is well established that an employer is not relieved of its obligation to bargain with a certified representative pending Board consideration, or reconsideration, of a request for review.

Respondent further asserts that the Regional Director erred when he failed to send to the Board, for its consideration with Respondent's request for review, copies of all affidavits and other data accumulated during the investigation of Respondent's objections to the election held in Case 26-RC-6356. We reject this contention. The Regional Director's Supplemental Decision, Order, and Certification overruling Respondent's objection was a final decision in the record. Respondent challenged this decision by timely filing a request for review with the Board. Section 102.67(d) of the Board's Rules and Regulations, Series 8, as amended, provides that any request for review be "a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." In conformance with this provision the Employer attached to its request for review documentary evidence, including witness statements, which was relied on by the Regional Director in his supplemental decision. Thus, in reviewing the Regional Director's decision, we did in fact consider all of the evidence relied on by the Regional Director. Where, as in the case at issue, it appears from the Regional Director's supplemental decision and the request for review that no substantial and material issues of fact exist, we find that it is no abuse of the Board's discretion to deny the request. See Section 102.69(d) of the Board's Rules and Regulations, as amended; *Reichart Furniture Co.* v. *N.L.R.B.*, 649 F.2d 397 (6th Cir. 1981); *Revco D.S. Inc.* v. *N.L.R.B.*, 653 F.2d 264 (6th Cir. 1981). Finally, Respondent's assertion that its due-process rights were violated by the procedure followed during the representation case is clearly without merit, for the history of the case shows that at all stages due consideration was given to Respondent and ample opportunity was afforded Respondent to present its evidence and contentions.

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, or, as we have found above, have no merit, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence,[3] nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. 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

Respondent, a corporation with an office and place of business in Burnsville, Mississippi, has been engaged in the manufacture of clothing. In the course and conduct of business operations, Respondent has annually sold and shipped from the Burnsville, Mississippi, facility products, goods, and materials valued in excess of $50,000 directly to

[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] Respondent's mere assertion in its opposition to the Motion for Summary Judgment that it has unspecified additional information to submit concerning the appropriateness of the employee unit does not suffice as an offer of newly discovered or previously unavailable evidence.

points outside the State of Mississippi, and has annually purchased and received at its Burnsville, Mississippi, facility products, goods, and material valued in excess of $50,000 directly from points outside the State of Mississippi.

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

Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

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 production and maintenance employees at the Employer's Burnsville, Mississippi, location, including production employees, repair employees, shipping employees, time worker employees, bundle worker employees, quality control employees, the regular part-time shipping employee, mechanics, and janitors, but excluding all office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On May 15, 1981, 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 26, 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 June 22, 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 June 29, 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 June 29, 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.

Accordingly, we find that Respondent has, since June 29, 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. Benchmark Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees at the Employer's Burnsville, Mississippi, location, including production employees, repair employees, shipping employees, time worker employees, bundle worker employees, quality control employees, the regular part-time shipping employee, mechanics, and janitors, but excluding all office clerical employees, guards 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 June 22, 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 June 29, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive 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, Benchmark Industries, Inc., Burnsville, Mississippi, 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 Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees at the Employer's Burnsville, Mississippi, location, including production employees, repair employees, shipping employees, time worker employees, bundle worker employees, quality control employees, the regular part-time shipping employee, mechanics, and janitors, but excluding all office clerical employees, guards 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 Burnsville, Mississippi, facility copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 26, 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 26, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[4] 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 Amalgamated Clothing and Textile Workers Union, 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 production and maintenance employees at the Employer's Burnsville, Mississippi, location, including production employees, repair employees, shipping employees, time worker employees, bundle worker employees, quality control employees, the regular part-time shipping employee, mechanics, and janitors, but excluding all office clerical employees, guards and supervisors as defined in the Act.

BENCHMARK INDUSTRIES, INC.