**Shop Rite Foods, Inc., Employer-Petitioner *and* United Food and Commercial Workers International Union, AFL–CIO, Local 1564.**[1] Case 28–UC–96

February 5, 1980

## DECISION ON REVIEW AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On July 9, 1979, this unit clarification petition was filed by the Employer. The petition sought clarification of three existing units, represented by the Union in certain of its stores in New Mexico, by excluding a total of four individuals as supervisors within the meaning of the Act.[2] On August 10, 1979, after a hearing, the Regional Director issued a Decision and Order in which he determined that unit clarification at that time would be disruptive of the collective-bargaining relationship.

Thereafter, pursuant to Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's Decision and Order, urging, in essence, that the Regional Director departed from precedent in finding the UC petition was untimely filed. On September 20, 1979, the Board granted the request for review.

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.

The Board has considered the entire record in this case and makes the following findings:

At the time the most recent collective-bargaining agreement was reached, on October 20, 1976, both the Union and the Employer acknowledged that the assistant managers were supervisors within the meaning of the Act. The parties voluntarily agreed, however, as part of the settlement of a strike occurring while negotiations on the contract continued, to allow these four individuals to continue to be covered by the agreement if they so chose. All four subsequently opted to be included in their respective bargaining units. The parties stipulated at the hearing that all four are now, and have been since before October 20, 1976, supervisors within the meaning of Section 2(11) of the Act. The Regional Director, noting the voluntary agreement of the parties to include these disputed individuals in the units covered by the contract, found that their exclusion during the term of the contract would be disruptive of the collective-bargaining relationship, and he accordingly dismissed the petition.

In its request for review, the Employer points out that the petition was filed just 101 days prior to the expiration of the then-current 3-year contract. The Employer contends that this filing, near the expiration date, was timely. It argues that the cases relied upon by the Regional Director found UC petitions inappropriate when filed in the early or middle stages of a contract term, and thus are not controlling in the instant case. We find merit in the Employer's contentions.

It is clear that the Board does not lack authority to clarify a bargaining unit established by agreement of the parties. *Manitowac Shipbuilding, Inc.*, 191 NLRB 786 (1971). While the Board has refused to process unit clarification petitions where they would be disruptive of voluntarily continued bargaining relationships, it has stated that it does so without prejudice to the filing of a clarification petition at an appropriate time.[3] Ordinarily, such petitions are appropriately filed shortly before the expiration of the collective-bargaining agreement. At that time, when the parties are preparing for negotiations on a new contract, unit clarification may spare them an unnecessary labor dispute. As we noted in *Arthur C. Logan Memorial Hospital*,[4] a petition filed 90 days prior to expiration of the agreement was processed by the Board in *Beth Israel Medical Center*.[5] The petition in this case was only slightly earlier filed, and we conclude that it should have been processed.

Having determined that the petition was erroneously dismissed, we shall order that it be reinstated. On the basis of the parties' stipulation, and in the absence of any evidence to the contrary, we find that the four assistant managers are supervisors within the meaning of the Act. In these circumstances, we shall clarify the unit as sought by the Employer-Petitioner.

## ORDER

It is hereby ordered that the petition in Case 28–UC–96 be, and it hereby is, reinstated, and that the existing units of employees be clarified to exclude as supervisors the assistant managers.

[1] On June 7, 1979, the Retail Clerks International Union and the Amalgamated Meatcutters and Butcher Workmen of North America merged, forming the United Food and Commercial Workers International Union, AFL–CIO. The name of the Union herein, formerly Retail Clerks International Association, Local 1564, has been amended to reflect this change.

[2] The four individuals, all of whom are designated comanagers or assistant managers by the Employer (hereinafter assistant managers), are Albert Quintana and Epifanio Ulibarri, both of whom were covered by the Albuquerque collective-bargaining agreement; Leo Padilla, whose employment was covered under the Taos agreement; and Ben Sanchez, who worked under the Los Alamos agreement.

[3] *Wallace-Murray Corporation, Schwitzer Division*, 192 NLRB 1090 (1971); *Arthur C. Logan Memorial Hospital*, 231 NLRB 778 (1977).

[4] 231 NLRB at 779, fn. 4.

[5] 229 NLRB 295 (1977).