

Zapf's Music Store, Inc. and Zapf's Music Store and Studios, Inc. and Retail Clerks Union, Local 1357, AFL-CIO. Case 4-CA-9497

November 17, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND PENELLO

Upon a charge filed on July 7, 1978, by Retail Clerks Union, Local 1357, AFL-CIO, herein called the Union, and duly served on Zapf's Music Store, Inc. and Zapf's Music Store and Studios, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 4, issued a complaint and notice of hearing on July 28, 1978, 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, 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 May 24, 1978, following a Board election in Case 4-RC-12792 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 June 19, 1978, 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 August 4, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Respondent admits that it is a single employer meeting the Board's jurisdictional standards and that the Union is a labor organization within the meaning of the Act. It denies that on August 3, 1977,² a majority of the employees in the unit found appropriate cast ballots to designate

the Union their exclusive collective-bargaining agent, but admits that on May 24, 1978, the Board certified the Union as the collective-bargaining representative of the employees in said unit. Respondent admits the allegation that it refused, and continues to refuse, to meet and bargain with the Union as the collective-bargaining representative, but denies the conclusory 8(a)(5) and (1) allegations. Respondent alleges that the certification of the Union was improper because the Board adopted the recommendation of the Hearing Officer that challenges to the ballots of three voters be sustained.

On September 18, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment.³ Subsequently, on September 27, 1978, 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 Notice To Show Cause.

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 its response to the Notice To Show Cause, Respondent attacks the Union's certification on the ground that the Board erred in sustaining the challenges to the ballots of three voters: Dale Trout, Leonard Zapf, and Anne Funk.

Review of the record herein reveals that in Case 4-RC-12792 the petition was filed by the Union on July 20, 1977. On August 3, 1977, a Stipulation for Certification Upon Consent Election was approved by the Regional Director, and the election was conducted on September 15, 1977. The tally of ballots showed that, of approximately 27 eligible voters, 12 cast ballots for the Union and 11 cast ballots against the Union; there were 3 challenged ballots, a sufficient number to affect the results of the election. On October 6, 1977, the Regional Director issued a Report on Challenged Ballots and notice of hearing, in which he ordered that a hearing be held before a Hearing Officer for the purpose of taking testimony to resolve substantial and material factual issues presented by the challenged ballots. Said hearing was held before a duly designated Hearing Officer on Oc-

¹ Official notice is taken of the record in the representation proceeding, Case 4-RC-12792, 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), enf'd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Folleu Corp.*, 164 NLRB 378 (1967), enf'd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

² The allegation in the complaint, and the admission in the answer, which state that the election was held on August 3, 1977, are in error. We note that the election was actually held on September 15, 1977.

³ Par. 11 of the Motion for Summary Judgment inadvertently states that Respondent's refusal to bargain commenced on or about October 11, 1977. The correct date, as reflected by the complaint and answer, is June 19, 1978.

tober 17, 1977. Thereafter, on December 16, 1977, Hearing Officer Barry R. Elson issued his Report on Challenged Ballots wherein he recommended that the Union's challenges to the ballots of the three voters be sustained. Pursuant to timely exceptions to the Hearing Officer's Report on Challenged Ballots, on May 24, 1978, the Board issued its Decision and Certification of Representative (not published in bound volumes), in which it adopted the Hearing Officer's findings and recommendations and certified the Union as the exclusive bargaining representative of the employees in the appropriate unit.

On or about June 6, 1978, the Union requested Respondent to bargain with the Union as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment. On or about June 19, 1978, and thereafter, Respondent refused, and has continued to refuse, to bargain collectively with the Union as the exclusive representative of all the employees in the appropriate unit.

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.⁴

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, 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 single employer, is, and has been at all times material herein, a Pennsylvania corporation with places of business located at Philadelphia, Norristown, and Jenkintown, Pennsylvania, where it is engaged in the retail sale and service of musical instruments and related products. During the past cal-

⁴ 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).

endar year, which period is representative of all times material herein, Respondent received gross revenues in excess of \$500,000 and purchased and received goods valued in excess of \$10,000 directly from points located 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

Retail Clerks Union, Local 1357, AFL-CIO, 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 full-time and regular part-time selling and nonselling employees employed by Zapf's Music Store, Inc., 5421-29 N. 5th Street, Philadelphia, Pennsylvania, and 300 W. Johnson Highway, Norristown, Pennsylvania, and Zapf's Music Store and Studios, Inc., located at Baederwood Shopping Center, Jenkintown, Pennsylvania; excluding all other employees, including outside sales representatives, store managers, music teachers, supervisors and guards as defined in the Act and all other employees excluded by law.

2. The certification

On September 15, 1977, 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 4, 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 May 24, 1978, 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 6, 1978, 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 19, 1978, 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 19, 1978, 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 the 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), enf. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enf. 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. Zapf's Music Store, Inc. and Zapf's Music Store and Studios, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Clerks Union, Local 1357, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time selling and nonselling employees employed by Zapf's Music Store, Inc., located at 5421-29 N. 5th Street, Philadelphia, Pennsylvania, and 300 W. Johnson Highway, Norristown, Pennsylvania, and Zapf's Music Store and Studios, Inc., located at Baederwood Shopping Center, Jenkintown, Pennsylvania; excluding all other employees, including outside sales representatives, store managers, music teachers, supervisors and guards as defined in the Act and all other employees excluded by law, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 24, 1978, 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 19, 1978, 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 to 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, Zapf's Music Store, Inc. and Zapf's Music Store and

Studios, Inc., Philadelphia, Norristown, and Jenkintown, 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 Retail Clerks Union, Local 1357, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time selling and nonselling employees employed by Zapf's Music Store, Inc., located at 5421-29 N. 5th Street, Philadelphia, Pennsylvania, and 300 W. Johnson Highway, Norristown, Pennsylvania, and Zapf's Music Store and Studios, Inc., located at Baederwood Shopping Center, Jenkintown, Pennsylvania; excluding all other employees, including outside sales representatives, store managers, music teachers, supervisors and guards as defined in the Act and all other employees excluded by law.

(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 Philadelphia, Norristown, and Jenkintown, Pennsylvania, places of business copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 4, 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 insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁵ 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 Retail Clerks Union, Local 1357, AFL-CIO, 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 selling and nonselling employees employed by Zapf's Music Store, Inc., located at 5421-29 N. 5th Street, Philadelphia, Pennsylvania, and 300 W. Johnson Highway, Norristown, Pennsylvania, and Zapf's Music Store and Studios, Inc., located at Baederwood Shopping Center, Jenkintown, Pennsylvania; excluding all other employees, including outside sales representatives, store managers, music teachers, supervisors and guards as defined in the Act and all other employees excluded by law.

ZAPF'S MUSIC STORE, INC. AND ZAPF'S MUSIC
STORE AND STUDIOS, INC.