Safeway Stores, Inc. *and* General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 32-CA-243 (formerly 20-CA-13028)

June 21, 1978

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On January 25, 1978, Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to Respondent's exceptions.

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 record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge [1] and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Safeway Stores, Inc., Richmond, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge: This matter was heard in San Francisco, California, on October 27, 1977.[1] The complaint, issued July 26, is based upon a charged filed June 17 by General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Union). The complaint alleges that Safeway Stores, Inc. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed by General Counsel and Respondent.

Upon the entire record, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and at all times material herein has been, a corporation with a place of business located in Richmond, California, where it is engaged in the distribution and retail sale of food and drygoods products to and in various States, including the State of California. During the past calendar year Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000 from its business operations in the State of California, and purchased and received merchandise valued in excess of $50,000 directly from suppliers located outside the State of California.

I find that Respondent is, and at all times material herein has been, an employer engaged in commerce, and in a business affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

[1] We agree with the Administrative Law Judge that Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing the Union's request for certain records it deemed relevant and necessary in connection with its processing of grievances on behalf of employees in the bargaining unit. In finding this violation, the Administrative Law Judge relied, in part, on the Board's decisions in *United-Carr Tennessee, a Division of TRW, Inc.*, 202 NLRB 729 (1973), and in *Worcester Polytechnic Institute*, 213 NLRB 306 (1974). Respondent contends that those cases are inapposite. Respondent argues that, unlike the facts here, in those cases the employers forced the unions to arbitrate the *merits* of the dispute without first supplying any of the relevant information sought by the unions. Respondent deems it legally significant that, in the instant case, it has not "forced" the Union to proceed to arbitration on the merits without supplying the requested information but instead has sought to have the issue of the *arbitrability* of the grievances determined, indicating that, if the arbitrator finds the issue arbitrable, it will supply the Union with as much of the information sought as Respondent deems relevant. Respondent contends that this excuses its refusal to supply any information at this time. We find Respondent's contention without merit. It is the teaching of *United-Carr Tennessee* and *Worcester Polytechnic* that, before a union is put to the effort of arbitrating even the question of arbitrability, it has a statutory right to potentially relevant information necessary to allow it to decide if the underlying grievances have merit and whether they should be pursued at all. Viewed in such a light, Respondent's attempt to distinguish the two cases fails, and we agree with the Administrative Law Judge's conclusion that Respondent violated the Act in this proceeding.

[1] All dates hereinafter are within 1977 unless stated to be otherwise.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates a large retail grocery distribution center in Richmond, California, where it warehouses grocery items to be shipped to its retail stores throughout the Bay Area. The center has a number of departments or divisions, including three that are involved herein, i.e., the frozen food warehouse, the "pre-pakt" warehouse, and the grocery warehouse. Employees in some departments are covered by collective-bargaining agreements between the Union and Respondent, and some of those agreements contain provisions for transfers among departments.

Prior to April 1977, employee production in the grocery warehouse was measured on a pieces-per-hour basis. On or about April 1, Respondent instituted a new system in the grocery warehouse for measuring employee performance. Pursuant to the new system, Respondent keeps inventory and other records whereby it ascertains how long each employee requires to complete work on orders, and compares those times with predetermined standards. Such records have been kept since April 1 on all employees in the grocery warehouse, i.e., regular employees, new employees, and employees transferred to the grocery warehouse from departments other than the grocery department.

In early May, 17 employees from other departments transferred to the grocery warehouse, pursuant to the contract between Respondent and the Union. Some of the employees were allowed to remain, while others were told that they did not meet production standards and would have to be transferred back to their original departments. Seventeen of the rejected transferees filed grievances with the Union. Those employees had transferred from the "prepakt," the crate yard, and the frozen foods departments. The Union and Respondent held a grievance meeting on June 15, at which the Union requested to see the production records for the new employees, the transferred employees and the regular employees, from January 1 to the time of the meeting. Respondent refused to provide the records at the time of the grievance meeting, and the Union requested that the grievances of the rejected transferees be arbitrated. Respondent agreed to arbitrate the dispute, and an arbitration hearing was scheduled for December 9. The Union has continued to request the information described above, and Respondent has continued to refuse production thereof.

B. *Positions of the Parties*

General Counsel contends that the Union has a statutory right to the requested information, since said records are necessary for evaluation and processing of the grievances filed by the 17 employees, which said grievances now are before an arbitrator.

Respondent contends that, under the contract clause relating to transfer of employees, it retains absolute discretion to send any transferred employee back to his original department within 30 days, and that the Union by contract waived its right to grieve any denial of transfer. Respondent further contends that, because it is not contractually bound to arbitrate any such grievance, the Union has no statutory right to request information such as that involved herein.

C. *Discussion*

1. The arbitral submission is not in dispute. Respondent and the Union agree that the arbitrator is asked to "dispose of all controversies between the Company and the Union relating to the disqualification of employees for transfer under the Company's MTM system." (Note: the new production record system.) [2]

The Union's contention that the grievances of the employees are permitted under the bargaining agreement is not frivolous, nor is there any indication that the subject was negotiated or agreed upon, nor is there any specific waiver in the contract of such a right to grieve. These facts are not in dispute; they are recognized by Respondent, who stated in its brief: "The parties did not come to any agreement concerning the extent of the Union's right, if any, to grieve transfer disqualifications and therefore scheduled an arbitration to resolve outstanding differences in this issue."

Respondent stated at the hearing and in its brief, that it will seek during arbitration first to have the arbitrator decide whether or not the Union is authorized by the bargaining agreement to grieve transfer denials. Respondent says its course of action then will be dictated by the arbitrator's determination on the grievability issue: If the arbitrator determines that the matter is grievable, Respondent then will "provide the Union with information that it requests concerning the relevancy of the rejection of the transferees." [3] However, Respondent says, if the arbitrator decides that the Union legally cannot grieve the transfer denials, "that should be the end of the case," and no information will be submitted to the Union.

The basic point relative to the arbitration is that the matter has been submitted to the arbitrator for decision on all issues involved in the transfer denial. Respondent's proposed strategy before the arbitrator is not relevant. What Respondent at the present time contends will be its reaction to the arbitrator's decision that the Union can grieve the transfer denials, if such a decision is made, is both speculative and irrelevant. Respondent in the present proceedings challenges some of the information sought by the Union as irrelevant. It is apparent that a similar challenge will be made at arbitration, if the Union prevails on the grievability issue. Although Respondent says it will turn over to the Union certain information if it loses the grievability argument before the administrator, Respondent does not say it will turn over all the requested information. Such a stance would result in further argument, delay and possibly litigation, even if the Union prevailed at arbitration on the grievability issue. Therefore, Respondent's present ar-

[2] This statement is supported by the transcript of hearing, as well as documents and supporting papers filed pursuant to the Union's motion to reopen the record, and replies thereto.

[3] Counsel for Respondent later stated that, if the arbitrator decided the matter is grievable, "then we will be pleased to give the Union any relevant information that it desires."

guments place the Union in a situation of "heads I win, tails you lose," so far as the arbitration is concerned.

In view of the foregoing, the case at this juncture properly can be considered only on the basis that Respondent's denials of transfer for 17 of its employees have been grieved by the Union and the matter is before an arbitrator. All other considerations relative to the arbitration must be set aside as irrelevant to the issue of whether or not the Union is entitled under the Act to the information it requested.

2. The principal issue is whether, in this unfair labor practice proceeding, the Union is entitled to an order for production of information used by Respondent as the basis for denying employee transfer requests, or whether that question should be deferred to an arbitrator.

An employer is required, under the Act, to turn over to a union information potentially relevant and useful to the union in discharging its statutory responsibilities.[4]

The basic law on this subject was discussed in detail by Administrative Law Judge Lipton in *United-Carr Tennessee,*[5] which decision was adopted by the Board. The facts of *United-Carr Tennessee* are similar to those involved herein, in that respondent there refused to provide the union with information relevant to an employee grievance; the arbitration process was instituted pursuant to the parties' bargaining agreement; thereafter, an 8(a)(5) unfair labor practice charge was filed by the union because of respondent's refusal to provide the requested information; a defense to the unfair labor practice charge was based upon *Collyer.*[6] Administrative Law Judge Lipton relied, in his decision, upon *Acme Industrial Co., supra,* and quoted therefrom to support his finding that "where the employer withholds requested information which is potentially relevant in assisting a union intelligently to evaluate or process a grievance—unless the statutory right to such information is effectively waived in the contract—the Board's *Collyer* doctrine is not applicable to such an issue."

United-Carr Tennessee subsequently was discussed by Administrative Law Judge Harmatz in *Worcester Polytechnic Institute,*[7] a decision adopted by the Board. The Administrative Law Judge adopted the reasoning of *United-Carr Tennessee* in confirming the right of the union to relevant information relating to an employee grievance, even though arbitration also was being pursued, and stated, *inter alia:*

> . . . Furthermore, the fact that arbitration is now pending, which includes a request on the arbitrator that the College produce the information, hardly serves as a basis for distinguishing *United-Carr, supra.* To hold otherwise would result in a nullification of statutory precedent entitling a labor organization to information potentially necessary to evaluate whether or not a grievance should be pursued. Harmonious bargaining relationships and industrial peace require strict adherence to statutory principles which are calculated to minimize disputes. In this case the Union's having elected to proceed to arbitration, on an uninformed basis, fails to furnish any cogent excuse for the College's refusal to provide information during the prearbitration stages and at a time when the Union, if such data were made available, might well have been persuaded that the facts supported the propriety of the layoff. Furthermore, by virtue of the College's contention, whatever the outcome of the arbitration proceeding, the failure to take steps required by the statute which might have averted a grievance would stand unremedied, and to withhold Board processes would, perforce, entail a condonation of the College's disregard of its statutory obligations, a result which would hardly contribute to effective implementation of the arbitral process in the future.

The facts now being considered are not different in any important respect from those considered in *United-Carr Tennessee* and *Worcester Polytechnic.*[8] No different holding is indicated.

3. The only remaining question is whether the information sought by the Union is relevant to the grievances of the 17 employees. Respondent contends that the relevant information consists only of "documents with regard to all the transferees, including those that attempted to transfer and were successful and those that attempted to transfer and who were unsuccessful," together with information concerning outside applicants who applied for employment and were accepted or rejected.

The General Counsel seeks (1) records relating to rejected and accepted transfer employees, which Respondent agrees are relevant; [9] (2) records relating to new employees, which Respondent agrees are relevant; [10] (3) records of regular employees, which Respondent contends are not relevant; and (4) performance records of employees between January 1 and April 1, which Respondent contends are not relevant.

Although a determination of relevance involves some subjective considerations, the subject permits objective analysis in this case. Courts and the Board consistently have taken a broad view of "relevance," and relate it to a "discovery-type standard." [11]

So far as (3) is concerned, the Union contends that the wording of the bargaining agreement relating to "pre-pakt" employees precludes Respondent from requiring the 30-day probationary period of them, and that they are to be treated as regular employees rather than new employees. In order to decide whether or not performance of the "pre-pakt" employees warrants arbitration of their rejection by Respondent, the Union first must compare the performance of those employees with that of regular employees. The relevance of the requested information is clear.

So far as (4) above is concerned, it is clear that, if the Union intelligently is to decide whether or not to pursue some or all of the 17 employee grievances, the transfer

[4] *N.L.R.B.* v. *Acme Industrial Co.,* 385 U.S. 432 (1967).

[5] *United-Carr Tennessee, a Division of TRW, Inc.,* 202 NLRB 729 (1973).

[6] *Collyer Insulated Wire, A Gulf and Western Systems Co.,* 192 NLRB 837 (1971).

[7] *Worcester Polytechnic Institute,* 213 NLRB 306 (1974).

[8] At no stage of these proceedings has there been a contention that the Union waived its right to the requested information, and no such waiver is found.

[9] This agreement was stated at the hearing.

[10] *Id.*

[11] *Acme Industrial Products, supra.*

refusals cannot be considered in a vacuum. Any changes of practice, and any implications to be drawn therefrom, can be ascertained only if pre-April 1 practice can be compared with practice under the new system. The requested information must be available in order to make such comparisons, and to decide upon the basis of such comparisons, which, if any, of the grievances it will pursue. Whether or not the Union decides to pursue all, or only some, or none, of the 17 grievances through the arbitration process is irrelevant. The important point is whether or not the Union has all the facts to which it is entitled, in order to make its decision, and some of those facts are involved in this controversy. The requested information thus is relevant. In this connection, Respondent's argument that it is difficult to translate past records into present standards is not persuasive. Having established the fact of relevancy, it is incumbent upon both Respondent and the Union to exert their best efforts in resolving any translation problems that may be involved.

Based upon the foregoing, it is found that Respondent's refusal to produce for the Union's use the requested information violates Section 8(a)(5) and (1) of the Act, as alleged.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Respondent's activities set forth in section III, above, occurring in connection with the operations of Respondent 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

Pursuant to Section 10(c) of the Act, it is recommended that Respondent be ordered to cease and desist from engaging in the unfair labor practices found, and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully has failed to perform its bargaining obligation by denying to the Union, as the exclusive representative of Respondent's employees in an appropriate unit, production records for all grocery warehouse employees from January 1, 1977, to the present time, for use in connection with prosecution of grievances filed on behalf of 17 employees whose requests for transfer were denied, I recommend that Respondent be ordered promptly to furnish such information to the Union.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All grocery and frozen food warehouse employees employed by Respondent at its Richmond, California, distribution center, excluding office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.
4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.
5. By refusing to furnish to the Union production records for all grocery warehouse employees from January 1, 1977, to the present time, for use in connection with prosecution of grievances filed on behalf of 17 employees whose requests for transfer were denied, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, as amended, I hereby issue the following recommended:

ORDER [12]

The Respondent, Safeway Stores, Inc., Richmond, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to perform its statutory bargaining obligation owing to General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America as the exclusive representative of Respondent's employees in the unit described below, by refusing to furnish the Union with production records for all grocery warehouse employees from January 1, 1977, to the present time, for use in connection with prosecution of grievances filed on behalf of 17 employees whose requests for transfer were denied:

> All grocery and frozen food warehouse employees employed by Respondent at its Richmond, California, distribution center, excluding 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 their bargaining rights through the above-named Union, which are guaranteed them in Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) Furnish to the Union production records for all grocery department employees from January 1, 1977, to the present time, for use in connection with prosecution of grievances filed on behalf of 17 employees whose requests

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

for transfer were denied.

(b) Post at its physical plant office in Richmond, California, copies of the attached notice marked "Appendix." [13] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized 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 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[13] 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

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice. We intend to carry out the Order of the Board, the judgment of any court, and to abide by the following:

The Act gives all employees these rights:

To organize themselves

To form, join, or help unions

To bargain collectively through representatives of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refuse to do any or all of these things.

WE WILL NOT refuse to perform our statutory bargaining obligation owing to General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of our employees in the appropriate unit described below, by refusing to furnish the Union with information relevant and necessary for the proper prosecution of grievances filed on behalf of employees:

All grocery and frozen food warehouse employees employed by Respondent at its Richmond, California, distribution center, excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their bargaining rights through the above-named Union, which are guaranteed them in Section 7 of the Act.

WE WILL furnish to the above-named Union production records for all grocery warehouse employees from January 1, 1977, to the present time, for use in connection with prosecution of grievances filed on behalf of 17 employees whose requests for transfers were denied.

SAFEWAY STORES, INC.