

**Allen's I.G.A. Foodliner and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Local 227 Case 9-CA-12147**

July 3, 1978

**DECISION AND ORDER**

BY CHAIRMAN FANNING AND MEMBERS JENKINS  
AND MURPHY

Upon a charge filed on January 30, 1978, by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Local 227, herein called the Union, and duly served on Allen's I.G.A. Foodliner, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint on February 24, 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 October 18, 1977, following a Board election in Case 9-RC-11797, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>1</sup> and that, commencing on or about January 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 March 7, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint and stating certain affirmative defenses.

On March 16, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on March 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 contends that the Board committed substantial error (1) in sustaining the Union's objections to the first election in Case 9-RC-11797, and (2) overruling Respondent's objections to the second election and certifying the Union as the bargaining representative for Respondent's employees. In its response to the Notice To Show Cause Respondent further contends that Respondent should be permitted to interrogate the Board agent who conducted the second election.

Respondent admits in its answer that it has refused, and continues to refuse, to bargain with the Union.

Our review of the record herein, including the record in Case 9-RC-11797, discloses that pursuant to the Regional Director's Direction of Election dated December 22, 1976, an election was conducted on January 20, 1977, among a unit of "all full-time and regular part-time employees employed at the East Morehead, Kentucky and West Morehead, Kentucky stores but excluding all guards, the store managers, the night managers and assistant night managers and all other supervisors as defined in the Act." Of the total number of votes cast, 38 were for Petitioner, 41 against, and 1 ballot was challenged.

On January 26, 1977, the Union filed timely objections to the election. Thereafter on March 25, 1977, the Acting Regional Director issued a Supplemental Decision, Order Directing Hearing and Notice of Hearing, in which he ordered a hearing to resolve issues raised by the Union's Objections 3 and 5.<sup>2</sup> The Union's Objection 3 alleged that Respondent unlawfully told an employee 1 hour prior to the election that "it did not see how the stores could continue to operate if Petitioner was elected." In Objection 5 the Union alleged that Respondent threatened employees with store closings, loss of jobs, and predictions of strikes and other inconveniences if the Union won

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 9-RC-11797, 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 *ITV ElectroSystems, Inc.*, 166 NLRB 938 (1967), enf'd, 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd, 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enf'd, 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

<sup>2</sup> The Regional Director overruled the remaining objections which alleged that Respondent improperly distributed misleading campaign literature less than 24 hours prior to the election; told employees that it would be hard to deal with if the Union won; that it would be difficult to get another job in Morehead, Kentucky; and that employees would have to strike as Respondent would not agree to any wage proposals.

the election. On June 21, 1977, Hearing Office Andrew L. Lang issued his report and recommendations in which he recommended that the Union's Objections 3 and 5 be sustained, that the election of January 20 be set aside, and that a second election be conducted.

On July 12, 1977, Respondent filed exceptions to the Hearing Officer's report, asserting that there was no basis for the Hearing Officer's conclusion that Respondent engaged in threats which violated the rights of employees. On July 15, 1977, the Regional Director for Region 9 issued a Second Supplemental Decision, Order, and Direction of Second Election basically adopting the Hearing Officer's recommendations. Although advised of its right to do so, Respondent did not request Board review of this determination.

On August 12, 1977, a second election was held and, of the total number of votes cast, 46 were for the Union and 32 against it. On August 17, 1977, Respondent filed timely objections alleging that: (1) the Board agent improperly expressed an opinion in the presence of Respondent's employees which prejudiced them in the exercise of their rights; (2) the Board permitted the election box to be opened without the Respondent's observer being present; (3) the Regional Director erred in his Second Supplemental Decision by directing a second election; (4) the Union promised benefits to employees to influence the outcome of the election; and (5) the Union threatened and coerced employees and interfered with their free choice in the election as well as prevented them from voting. After an investigation, the Regional Director issued his Third Supplemental Decision and Certification of Representative overruling Respondent's objections. Thereafter, on November 3, 1977, Respondent requested review of the Regional Director's Third Supplemental Decision. The Board denied the request on grounds that it raised no substantial issues warranting review.

By letter dated January 10, 1978, the Union requested and continues to request that Respondent recognize and commence bargaining with it. Respondent, in a letter dated January 19, 1978, refused to bargain with the Union on grounds that the Union was improperly certified inasmuch as "the first election in which the Union was rejected by our employees truly reflected the choice of those employees."

Respondent seeks to justify its refusal to recognize and bargain with the Union on grounds that the Board erred in (1) sustaining the Union's objections to the first election in Case 9-RC-11797 and (2) ov-

erruling Respondent's objections to the second election and certifying the Union as the bargaining representative of Respondent's employees. Respondent further contends that the Union's certification is invalid and that certain issues should be litigated by trial; in particular, Respondent should be permitted to interrogate the Board agent who conducted the second election.

The issues which Respondent seeks to litigate in the instant case were or could have been litigated in the prior representation proceeding. In addition to the fact that Respondent's request for permission to interrogate the Board agent who conducted the second election was not made until now and is therefore untimely, the record establishes that the Regional Director's Third Supplemental Decision and Certification of Representative specifically considered the question of possible election misconduct by the agent and overruled Respondent's objections relating thereto. Furthermore, Respondent, in its request for review, acknowledged that it had requested the Regional Director to supply it with information relating to the Board agent who conducted the election and his behavior therein, and that this request was denied by a letter of September 20, 1977, from the Field Examiner conducting the investigation. Thus, the matter of the Board agent's alleged misconduct was considered in the underlying representation proceeding, and Respondent's current request to interrogate the Board agent in question is, regardless of its timeliness, an attempt to relitigate that issue herein.

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.<sup>3</sup>

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:

<sup>3</sup> 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).

## FINDINGS OF FACT

## I. THE BUSINESS OF RESPONDENT

Respondent is engaged in the retail sale of groceries at four locations in Kentucky, including the two facilities located at Morehead, Kentucky, the only facilities involved in this proceeding.

During the past 12 months, a representative period, Respondent had a gross volume of business in excess of \$500,000. During the same period, Respondent purchased and received goods and materials valued in excess of \$50,000 which were shipped to its Kentucky facilities directly from points outside the State of Kentucky.

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 Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Local 227, 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 employees employed at the Employer's East Morehead, Kentucky, and West Morehead, Kentucky stores; but excluding all guards, the store managers, the night managers and the assistant night managers and all other supervisors as defined in the Act.

## 2. The certification

On August 12, 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 9, designated the Union as their representative for the purpose of collective bargaining with Respondent.<sup>4</sup> The Union was certified as the

collective-bargaining representative of the employees in said unit on October 18, 1977, 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 January 10, 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 January 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 January 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 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 commenc-

<sup>4</sup> The first election was held on January 20, 1977. On January 26, 1977, however, Petitioner filed timely objections and the Regional Director for Region 9 sustained said objections and directed a second election.

es 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 (C.A. 5, 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (C.A. 10, 1965).

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

#### CONCLUSIONS OF LAW

1. Allen's I.G.A. Foodliner is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Local 227, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees employed at Employer's East Morehead, Kentucky and West Morehead, Kentucky stores, but excluding all guards, the store managers, the night managers and assistant night managers and all other 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 October 18, 1977, 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 January 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, Allen's I.G.A. Foodliner, Morehead, Kentucky, 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 Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Local 227, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time employees employed at the Employer's East Morehead, Kentucky and West Morehead, Kentucky stores, but excluding all guards, the store managers, the night managers and assistant night managers and all other 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 facilities in East Morehead and West Morehead, Kentucky, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of said notice, on forms provided by the Regional Director for Region 9, 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 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>5</sup> 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 Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Local 227, 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 employees employed at the Employer's East Morehead, Kentucky and West Morehead, Kentucky stores, but excluding all guards, the store managers, the night managers and assistant night managers and all other supervisors as defined in the Act.

ALLEN'S I.G.A. FOODLINER