

In the Matter of WESTERN WEAR OF CALIFORNIA, INC., SOMETIMES
KNOWN AS CIRCLE A OF CALIFORNIA, INC. and LOS ANGELES JOINT
BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, CIO

Case No. 21-CA-468.—Decided December 30, 1949

DECISION

AND

ORDER

On July 15, 1949, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report, and a supporting brief.¹

On August 31, 1949, Respondent filed a "Motion to Vacate Order of the Board on Failure to Receive Exceptions to Trial Examiner's Recommendations," stating in support thereof that it had "invariably" filed briefs with the Board on the final day for filing, via registered mail, and never in the past had any exceptions been taken to such documents being received and given full consideration.

We think it clear from the language of Section 203.46² of the Board Rules and Regulations that in order to be timely filed, exceptions and briefs must be *received* by the Board at Washington, D. C., *within* the specified period allowed. However, in view of the fact that the Board

¹ Upon the request of Respondent, the time for filing exceptions and briefs was extended to August 22, 1949, but they were not received by the Board in Washington, D. C., until August 26, 1949, although placed in the mail on the deadline date of August 22, 1949. In the interim, the Board on August 25, 1949, issued an order adopting the findings, conclusions, and recommendations of the Trial Examiner. Such order is herewith rescinded for reasons hereinafter stated.

² Section 203.46 states in part, "Within 20 days or within such further period as the Board may allow from the date of service of the order transferring the case to the Board pursuant to Section 203.45, any party may file with the Board in *Washington, D. C.*, an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding . . . as he relies upon, together with the original and six copies of the brief in support thereof, and immediately upon such filing, copies shall be served on each of the other parties; . . ." [Emphasis supplied.]

to date has never explicitly interpreted this section and that Respondent has honestly but mistakenly relied upon its own interpretation of this section by placing the instant exceptions and brief in the mail on the last day of the allotted period, we are reluctant to penalize the Respondent on such technical grounds. We shall therefore grant the motion of the Respondent.³

The Board⁴ has reviewed the rulings made by the Trial Examiner at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs of the Respondent, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the additions noted herein.

1. The Trial Examiner found and we agree, that the Respondent refused to bargain with the Union in violation of Section 8 (a) (1) and 8 (a) (5) of the Act. The Respondent admits that it refused to bargain with the Union but defends its position upon the ground that the Regional Director improperly counted the vote of a supervisor in the unit thereby changing its composition and relieving the Respondent of its obligation to bargain pursuant to Section 14 (a) of the Act.

It is now well established that this Board will not disturb the rulings of a Regional Director affecting consent election agreements, such as the one in this proceeding, unless such ruling is clearly arbitrary or capricious.⁵ It is implicit in such agreements that the parties will forego the usual post-election procedure and substitute the Regional Director's determination as final.⁶ Despite the fact that the field examiner did not interview Respondent concerning the duties and status of Tagami during the investigation on challenges, it is clear that the Regional Director, although not bound by such post-election procedure, did accept and consider Respondent's objections to Report on Challenges before opening the challenged ballots in dispute.⁷ In short, we are convinced, and find from this record, that the Regional

³ While Member Reynolds is in accord with this ruling on Section 203.46, he does not feel that the facts warrant the granting of Respondent's Motion to Vacate the Board's Order of August 25, 1949.

⁴ Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Houston, Reynolds and Murdock].

⁵ *Ferris-Lee Lumber and Mfg. Co.*, 71 NLRB 989, and cases cited therein; *McMullen Levens Co.*, 83 NLRB 948; *International Shoe Co. (Searcy, Arkansas, plant)*, 87 NLRB 479.

⁶ *International Shoe Co. (Searcy, Arkansas, plant)*, *supra*.

⁷ The record shows that the Regional Director conducted an investigation of the challenged ballots, sustaining the Respondent as to one employee and overruling its challenge as to Tagami on the following grounds: (1) that her primary duties consisted of taking bundles of clothes from the bundle girl and distributing them to the operators; (2) also advised operators as to the trimming to be used (threads, linings, buttons); (3) prior to

Director acted in accordance with established principles, and find no grounds for disturbing his rulings in the instant case. We therefore conclude that as soon as the Union was certified by the Regional Director, pursuant to Section 203.54 of the Board Rules and Regulations—Series 5,⁸ the Respondent was obliged to honor the Union's request to bargain collectively. By its failure to do so, Respondent has violated Section 8 (a) (1) and 8 (a) (5) of the Act.⁹

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Western Wear of California, Inc., sometimes known as Circle A of California, Inc., and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Los Angeles Joint Board, Amalgamated Clothing Workers of America, CIO, as the exclusive representative of all production employees of the Respondent, but excluding shipping and clerical employees, and all supervisors as defined by the Act;

(b) In any manner interfering with the efforts of the Los Angeles Joint Board, Amalgamated Clothing Workers of America, CIO, to bargain collectively with it on behalf of the employees in the aforesaid appropriate unit.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Los Angeles Joint Board, Amalgamated Clothing Workers of America, CIO, as the exclusive representative of all production employees of the Respondent, but excluding shipping and clerical employees, and all supervisors as defined in the Act;

the election she had never been told she was a supervisor; (4) she had never exercised authority to hire and fire, discipline, or effectively recommend; (5) after the election she was notified by Respondent that they considered her a supervisor; (6) she received no larger salary than a bundle girl, which was still under the maximum wage rate for operators.

⁸ Section 203.54 states in part: "Consent election agreements . . . the method of conducting such consent election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to Section 203.61 and 203.62 except that the rulings and determinations by the Regional Director of the results thereof shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, *with the same force and effect as if issued by the Board.* [Emphasis supplied.]

⁹ In view of the above findings, we deem it unnecessary to pass upon the Trial Examiner's additional finding based on the *Rohr Aircraft* case (*Rohr Aircraft Company*, 21-UA-638, unreported), that it was unnecessary to determine Tagami's status where her ballot did not affect the results of the election.

(b) Post at its Los Angeles plant copies of the notice attached hereto, marked Appendix A.¹⁰ Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by other material;

(c) Notify the Regional Director for the Twenty-first Region (Los Angeles, California), in writing, within ten (10) days from the receipt of this Decision and Order what steps Respondent has taken to comply herewith.

AND IT IS FURTHER ORDERED that the Board's order of August 25, 1949, be, and it hereby is, revoked.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT by refusing to bargain or similar conduct, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist LOS ANGELES JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this Union, or any other labor organization.

WE WILL BARGAIN collectively upon request with the above-named Union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

¹⁰ In the event that this Order is enforced by decree of a United States Court of Appeals, there shall be inserted before the words, "A DECISION AND ORDER" the words, "DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING."

All production employees excluding shipping and clerical employees and supervisory employees as defined in the National Labor Relations Act, as amended.

WESTERN WEAR OF CALIFORNIA, INC.,
Employer.

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Eugene Purver, Esq., of Los Angeles, Calif., for the General Counsel.

Wirin, Rissman and Okrand, by *Robert R. Rissman, Esq.*, of Los Angeles, Calif., for the Union.

Mrs. Edwin Selwin, of Beverly Hills, Calif., for the Respondent.

STATEMENT OF THE CASE

Upon a charge duly filed June 2, 1949, by Los Angeles Joint Board, Amalgamated Clothing Workers of America, CIO, herein called the Union, the General Counsel of the National Labor Relations Board, herein called respectively, the General Counsel and the Board, by the Regional Director for the Twenty-first Region (Los Angeles, California), issued a complaint, dated June 10, 1949, alleging that Western Wear of California, Inc., sometimes known as Circle A of California, Inc., herein called the Respondent, had engaged in, and was engaging in, unfair labor practices affecting commerce, within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the complaint and charge, together with a notice of hearing, were duly served upon Respondent and the Union.

With respect to unfair labor practices, the complaint alleged that on or about May 28, 1949, and at all times thereafter, Respondent refused and does now refuse to bargain collectively with the Union as the exclusive representative of Respondent's employees in an appropriate unit although the Union's status as such bargaining representative had been established on or about May 6, 1949.

Respondent's answer made orally at the hearing, admitted the factual allegations in the complaint but denied the commission of unfair labor practices.

Pursuant to notice, a hearing was held on June 21, 1949, at Los Angeles, California, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Union were represented by counsel and Respondent by a representative. All parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses,¹ and to introduce evidence relevant to the issues.

The parties were afforded opportunity to argue on the record and some discussion of the issues was had in the nature of argument. No briefs have been filed.

¹ No witnesses were called by the General Counsel or the Union. I rejected Respondent's offer to call witnesses to testify to matters which I had ruled to be irrelevant.

Upon the entire record in the case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Western Wear of California, Inc., sometimes doing business as Circle A of California, Inc., is a California corporation engaged at Los Angeles, California, in the manufacture of men's sport shirts. During 1948, Respondent purchased materials and supplies, approximately 90 percent of which originated outside the State of California, having a value of about \$150,000. During the same period, Respondents' sales approximated \$180,000, in value, about 70 percent of which was sold to buyers outside the State of California.

II. THE ORGANIZATION INVOLVED

Los Angeles Joint Board, Amalgamated Clothing Workers of America, is a labor organization affiliated with the Congress of Industrial Organizations, admitting to membership employees of Respondent.

III. THE UNFAIR LABOR PRACTICES

1. The appropriate unit

The parties agree and I find that all production employees of Respondent excluding shipping and clerical employees, and supervisory employees as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

2. The Union's majority in the appropriate unit; the refusal to bargain

On May 6, 1949, by formal consent of the parties, an election was conducted by a representative of the Regional Director of the Board at Los Angeles among Respondent's employees in the appropriate unit.

The result was inconclusive in that challenged ballots were sufficient in number to affect it. Under authority of the consent election agreement, the Regional Director caused an investigation to be made of the six challenged ballots and served a copy of his findings and conclusions upon the parties. Respondent now objects only to his finding that the ballot of Haruko Tagami be opened and counted, contending Tagami to be a supervisor as defined in the Act. The Regional Director considered Respondent's contention, concluded that the evidence before him did not support it, and opened and counted the ballot of Tagami along with those of two other employees as to whose ballots no contention is now made.

On May 27, the Regional Director upon the basis of a revised tally of ballots showing 18 votes for and 15 against the Union, issued his Certification of Representatives. Respondent immediately refused to honor the certification arguing that by counting the ballot of Tagami, the Regional Director had included a supervisor in the unit thereby changing its composition and relieving the Respondent of obligation to bargain with the Union. Respondent relies upon Section 14 (a) ² of the Act to support its position.

²Specifically that portion reading:

... no employer subject to this act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

Clearly, the counting of Tagami's ballot did not affect the election result. I find, therefore, that on and since May 26 (the date of the opening and counting of the challenged ballots), the Union was and now is the exclusive representative of Respondent's employees in the appropriate unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

There exists no necessity, as the issues are framed, to decide whether the position occupied by Tagami entails the exercise of supervisory authority as defined in the Act.³ Contrary to Respondent's contention, the Regional Director's action in overruling the challenge to the ballot of Tagami did not serve to alter the *composition* of the unit. His decision was based upon a finding that she did not possess supervisory status. Respondent's duty under the Act is to bargain with the Union upon request regarding the employees in the appropriate unit. Even were it established that the Regional Director erred in his finding as to Tagami, the duty would remain unchanged. Of course the certification does not grant authority to the Union to bargain for supervisors and counsel for the Union at the hearing expressly denied intention of making such claim. Respondent's refusal to bargain is based upon a misconception. As the unit has not been changed from the one agreed upon and found to be appropriate, as the Union has demonstrated its majority in that unit, it follows that the refusal was in violation of Section 8 (a) (5) of the Act. I so find.

By the unlawful refusal to bargain, it is found, Respondent interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act and thereby violated Section 8 (a) (1) of the Act.

It was stated at the hearing that Respondent's employees struck because of the refusal to bargain and General Counsel moved to amend the complaint so as to allege the happening of an unfair labor practice strike. The motion was denied. It is of course true that, if Respondent's employees have struck because of Respondent's unlawful refusal to bargain, they must be reinstated to their positions upon application, discharging replacements if necessary.⁴

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 of Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and such of them as have been found to constitute unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found Respondent to have engaged in unfair labor practices violative of Section 8 (a) (1) and (5) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It will be recommended therefore that Respondent upon request bargain with the Union as the exclusive representative of the employees in the appropriate unit.

³ For this reason I rejected Respondent's offer to prove that Tagami at the time of the election or thereafter was such a supervisor. See *Rohr Aircraft Company*, 21-UA-638, unreported, where the Board refused to determine the supervisory status of leadmen when it appeared that their ballots could not affect the election result.

⁴ *Vogue-Wright Studios, Inc.*, 76 NLRB 773, 813.

Upon this record, an inference that Respondent is disposed generally to deprive employees of rights secured to them by the Act appears to be unwarranted. Hence no general cease and desist order will be recommended.

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

CONCLUSIONS OF LAW

1. Los Angeles Joint Board, Amalgamated Clothing Workers of America, CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All production employees of Respondent, excluding shipping and clerical employees and supervisory employees as defined in the National Labor Relations Act, as amended, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. At all times since May 26, 1949, Los Angeles Joint Board, Amalgamated Clothing Workers of America, CIO, has been, and now is, the representative of a majority of Respondent's employees in the appropriate unit for purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on and after May 28, 1949, to bargain collectively with Los Angeles Joint Board, Amalgamated Clothing Workers of America, CIO, as the exclusive representative of all its employees 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.

5. By such refusal, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed 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.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Western Wear of California, Inc., sometimes known as Circle A of California, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing, upon request, to bargain collectively with Los Angeles Joint Board, Amalgamated Clothing Workers of America, CIO, as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours of employment, or other conditions of employment;

(b) In any like or similar manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Los Angeles Joint Board, Amalgamated Clothing Workers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with Los Angeles Joint Board, Amalgamated Clothing Workers of America, CIO, as the exclusive representative of all

employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its Los Angeles plant copies of the notice attached hereto, marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by other material;

(c) Notify the Regional Director for the Twenty-first Region (Los Angeles, California), in writing, within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, what steps Respondent has taken to comply herewith.

It is further recommended that unless, on or before twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the action aforesaid.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board—Series 5, as amended August 18, 1948, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said 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.

Dated at Washington, D. C., this 15th day of July 1949.

WALLACE E. ROYSTER,
Trial Examiner.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT by refusing to bargain or similar conduct, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist LOS ANGELES JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this union, or any other labor organization.

WE WILL BARGAIN collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production employees excluding shipping and clerical employees and supervisory employees as defined in the National Labor Relations Act, as amended.

WESTERN WEAR OF CALIFORNIA, INC.,
Employer.

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.