

for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay and the rights to reinstatement under the terms of these recommendations.

In order to make effective the interdependent guarantees of Section 7 of the Act, I shall recommend further that the Respondent cease and desist from infringing in any manner upon the rights guaranteed in said section. *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426; *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532 (C.A. 4).

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

CONCLUSIONS OF LAW

1. Local 517 and NPEU are labor organizations within the meaning of Section 2(5) of the Act.
2. By dominating and interfering with the formation and administration of NPEU, and contributing support thereto, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(2) of the Act.
3. By discriminating in regard to the hire or tenure of employment of Nunez and the striking employees, thereby discouraging membership in Local 517, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

Pay Less Drug Stores, Petitioner and Retail Food Clerks Union, Retail Clerks International Association, Local 870, AFL-CIO.

Case No. 20-RM-321. April 12, 1960

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Albert Schneider, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.
2. The labor organization involved claims to represent certain employees of the Employer.
3. The Employer-Petitioner seeks a representation election in a unit composed of employees at its new Hayward, California, retail drugstore. The Union contends that there is a contractual bar to this proceeding, and further that, under the circumstances, the requested single-store unit is inappropriate in view of the Employer's prior bargaining on a multiemployer basis.

The Employer, Pay Less Drug Stores, is a California corporation operating about seven retail drug establishments in the State of

California. Its main store is in Oakland, Alameda County, California, which is also the site of its executive offices. Since about 1949, the Employer has been a member of a multiemployer bargaining group, the Alameda County Retail Druggists Group, whose members operate retail drugstores in that county. This Group has been represented in bargaining with the Union herein by United Employers, Inc., which has negotiated a series of agreements with the Union. In a contract executed on September 27, 1957, and effective from September 1, 1957, to August 31, 1959, the scope of the recognition clause appears to have been limited to "registered pharmacists and unregistered employees" of the employer members of the Group.

On June 30, 1959, the Union notified the Group of its desire to negotiate a new contract to become effective on September 1, 1959; and, subsequently, it initiated discussions pertaining to the Employer's new Hayward, Alameda County, retail store, construction of which had commenced in May 1959. On September 13, 1959, negotiators representing the Group and the Union executed a so-called memorandum of agreement in which they agreed to recommend that the previous (expired) contract be renewed with certain specific changes. Included in the memorandum of agreement was a recommendation for a revised recognition clause to encompass "all employees of the . . . Drug Store or stores [of the employer members of the Group] in Alameda County . . ." The Hayward drugstore, in question, was formally opened for business on October 22, 1959. On November 16, 1959, the Union solicited the Hayward store employees to sign health and welfare applications. The Employer resisted this activity. The Employer filed the instant petition on November 23, 1959. Thereafter, on November 24, 1959, the Group and the Union executed a new 2-year contract, effective as of September 1, 1959. The recognition clause in this contract contained the same wording as that recommended in the so-called memorandum of agreement of September 13, 1959.

The Hayward drugstore is in Alameda County, California, about 20 miles distant from the Employer's Oakland store, the only other drugstore of the Employer in Alameda County. It has its own store manager, who exercises a considerable degree of autonomy in the operation thereof. He is primarily responsible for all phases of store operations, including the maintenance of its volume of business, inventory control, supervision of store personnel, buying, and execution of company policies. He has final authority to hire, discharge, promote, and prescribe the working conditions of the Hayward employees. The work force of the Hayward store, totaling about 70 at the time of the hearing on December 16, 1959, is composed almost wholly of new employees. There is little employee interchange between the Employer's Hayward and Oakland stores. Certain bookkeeping matters

are assigned to the Oakland store, but the payroll for the Hayward store is maintained locally.

On the basis of the foregoing, we find that the Employer's Hayward drugstore is a completely new operation and not an accretion. As the 1957-59 contract expired on August 31, 1959, and as the instant petition was filed on November 23, 1959, 1 day before the new contract was executed, it is clear that neither contract may, under well-settled law, bar an election.¹ The so-called memorandum of agreement of September 13, 1959, may not properly serve as a contract bar in this proceeding as it constituted merely a recommendation of the parties' representatives, and was subject to subsequent ratification.² Therefore, we find, for contract-bar purposes, that there was no written contract in existence covering the Group's employees at the time the instant petition was filed by the Employer on November 23, 1959. Moreover, as the memorandum of agreement was executed before the Employer began the new Hayward operation, and as the terms of the memorandum of agreement do not clearly cover this operation, there is no contract bar.³

We therefore find, in view of the foregoing, that a question affecting commerce exists concerning the representation of the Hayward, California, employees of the Employer, within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. As indicated above, there is a history of collective bargaining on a multiemployer basis. On the other hand, the Board normally permits employees at a new operation to decide whether they wish to be separately represented.⁴ Accordingly, under all the circumstances of this case, we are of the opinion that, for the purposes of collective bargaining, the employees at the Hayward store may constitute a separate appropriate unit or may appropriately be included in the multiemployer bargaining unit currently represented by the Union. We shall, therefore, make no unit determination with respect to the employees at the Hayward store at this time, but shall first ascertain the desires of these employees as expressed in the elections hereinafter directed.

There are three pharmacists employed at the Hayward store. It is clear that the pharmacists are professional employees within the meaning of the Act. As Section 9(b)(1) of the Act precludes the Board from including in a single bargaining unit professional and

¹ *Mt Clemens Metal Products Company*, 110 NLRB 931, 932; *Stewart and Nuss, Inc., et al, d/b/a Herndon Rock Products*, 97 NLRB 1250, 1251

² *American Broadcasting Company, etc.*, 114 NLRB 7, 8

³ *Fleming & Sons, Inc.*, 118 NLRB 1451, 1452. See also, *General Extrusion Company, Inc., et al.*, 121 NLRB 1165. As a contract must be sufficient on its face without recourse to parol evidence to constitute a bar, there is no merit to the Union's contention that the parties verbally agreed that the memorandum of agreement would cover the Hayward store. *Benjamin Franklin Paint & Varnish Co., a Division of United Wallpaper Inc.*, 124 NLRB 54

⁴ *Rockingham Poultry Cooperative Inc.*, 113 NLRB 376, 378.

nonprofessional employees without according to the former an opportunity of separately expressing their desires respecting such inclusion, we shall poll the professional employees.

Accordingly, we shall direct separate elections in the following voting groups:

(a) All employees at the Employer's Hayward, Alameda County, California, retail drugstore engaged in the handling or selling of merchandise, including unregistered salespeople, stock clerks or persons doing both sales work and stock work, but excluding pharmacists, persons doing culinary, office, delivery, initial promotional display, and store maintenance, and supervisors as defined in the Act.

(b) All pharmacists at the Employer's Hayward, Alameda County, California, retail drugstore, excluding all other employees and supervisors as defined in the Act.

The employees in the professional voting group (b) will be asked two questions on their ballot:

(1) Do you desire to be included in the same unit as other employees at the Employer's Hayward retail drugstore for the purposes of collective bargaining?

(2) Do you desire to be represented for the purposes of collective bargaining by the Retail Food Clerks Union, Retail Clerks International Association, Local 870, AFL-CIO?

If a majority of the professional employees in voting group (b) vote "Yes" to the first question, indicating their wish to be included in a unit with the nonprofessional employees, they will be so included. Their votes on the second question will then be counted together with the votes of the nonprofessional voting group (a) to decide whether the Hayward employees desire to be part of the multiemployer unit. If, on the other hand, a majority of the professional employees in voting group (b) vote against the inclusion, they will not be included with the nonprofessional employees. Their votes on the second question will then be separately counted to decide whether they want the Union to represent them in a separate professional unit. The Union has not indicated on the record that it is unwilling to represent the professional employees separately if those employees vote for separate representation. However, if the Union does not desire to represent the professional employees in a separate unit even if these employees vote for such representation, it may notify the Regional Director to that effect within 10 days of the date of this Decision and Direction of Elections.

Our unit determination is based in part, then, upon the results of the elections. However, we now make the following findings:

(1) If a majority of the professional employees vote for inclusion in a unit with nonprofessional employees, and if a majority of the employees in combined voting groups (a) and (b) vote for the Union,

they will be taken to have indicated their desire to be a part of the multiemployer unit, and the Union may bargain for them as part of its existing unit.

(2) If a majority of the professional employees vote against inclusion in a unit with nonprofessional employees or vote against representation by the Union, and if a majority of the employees in voting group (a) select the Union, the employees in the latter group will be taken to have indicated their desire to be a part of the multiemployer unit, and the Union may bargain for the employees in voting group (a) as part of its existing unit.

(3) If a majority of the professional employees do not vote for inclusion in the unit with nonprofessional employees, but vote to be represented by the Union, the Regional Director conducting the elections is instructed to issue a certification of representatives to the Union as the representative of all pharmacists at the Employer's Hayward, California, retail drugstore, excluding all other employees and supervisors as defined in the Act, a unit which the Board, in such circumstances, finds to be appropriate for the purposes of collective bargaining.

(4) In all other circumstances, the employees at the Employer's Hayward drugstore, professional and nonprofessional, shall remain unrepresented.

[Text of Direction of Elections omitted from publication.]

MEMBER FANNING took no part in the consideration of the above Decision and Direction of Elections.

City Products Corporation and Local 491, 491-A, 491-B, International Union of Operating Engineers, AFL-CIO. Case No. 12-CA-558. April 13, 1960

DECISION AND ORDER

On May 26, 1959, Trial Examiner Lloyd Buchanan 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. The Trial Examiner further found that the Respondent had not engaged in certain other alleged unfair labor practices, and recommended that the complaint be dismissed in that respect. Thereafter, the General Counsel filed exceptions and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The