

April 10, 1959, was recognition is the fact that Local 701 continued to picket after the election.⁸ The Trial Examiner believes this insufficient to sustain the General Counsel's burden of proving that the purpose of the picketing was to secure recognition. Furthermore, as noted above, the affirmative evidence adduced herein tends to establish that this was not the object of the picketing after April 10, 1959, and that Local 701's actions after the election were not designed to coerce employees to choose Local 701 as their bargaining agent.

In view of the foregoing, it is believed that the complaint, in its entirety, should be dismissed.

[Recommendations omitted from publication.]

⁸ Absent the testimony of Moore (which the Trial Examiner has rejected) there is no affirmative evidence that Local 701's object in the postelection picketing was to secure recognition.

Sears, Roebuck and Company and Local 688, Warehouse & Distribution Workers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Cases Nos. 14-CA-2045 and 14-RC-3463. May 5, 1960

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

On October 23, 1959, Trial Examiner C. W. Whittlemore issued his Intermediate Report in the above-entitled proceeding, finding that Sears, Roebuck and Company, the Respondent in Case No. 14-CA-2045, 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 recommended that a challenge to the ballot of Jewel Lamb, which was cast in a Board-directed election, be overruled and that her vote be opened and counted.¹ Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and finds merit in Respondent's exceptions. Accordingly, we adopt the findings, conclusions, and recommendations of the Trial

¹ On January 9, 1959, a Board-directed election in Case No. 14-RC-3463 was held, in which the employees at Sears' pool stock warehouse in St. Louis, Missouri, voted on whether they would be represented by Local 688. In this election 24 votes were cast for Local 688 and 23 against Local 688, with 2 ballots challenged. One challenge was overruled by the Board, and that ballot was ordered opened and counted. The Board further directed that a hearing be held on the second challenged ballot in the event the counting of the first should not be dispositive of the election. Upon opening and counting said ballot, it was determined that 24 votes had been cast for the Petitioner and 24 against the Petitioner. Accordingly, a hearing on the second challenged ballot was scheduled by an order dated June 11, 1959. Said order also consolidated the representation case with Case No. 14-CA-2045.

Examiner, only to the extent that they are consistent with our decision herein.

Jewel Lamb had occupied, for a period of 12 years, the position of "auditing supervisor" in the auditing department of Sears' pool stock warehouse at St. Louis, Missouri. Late in 1958, Local 688 began an organizational campaign among the warehouse employees. Lamb attended several union meetings. Shortly thereafter, an executive of Sears instructed Lamb that the Company did not wish to have its supervisors attending such meetings, as their so doing might influence employees to support the Union. Miss Lamb nevertheless continued to attend union meetings. She was notified that she was discharged, on November 21, 1958, for having disobeyed the instructions previously given to her. On January 7, 1959, Local 688 filed the charge herein alleging that Respondent, in discharging Lamb, had violated Section 8(a)(1) and (3) of the Act. Respondent denied that a violation of the Act had been committed, contending that Lamb was a supervisor, and that, having disobeyed instructions given to her, she was properly subject to discharge. We agree with this contention, and note that much of the testimony adduced on behalf of the Respondent was neither discredited nor mentioned in the Intermediate Report.

The Trial Examiner found that Lamb's work was routine in nature. We disagree and find that the record establishes that Lamb's authority was far greater than the Trial Examiner suggests. Lamb's superior, Stone, testified that Lamb was authorized to, and in fact did, recommend the hiring and discharge of employees.² She was further authorized to, and did, assign work to the employees in her department and discipline them when necessary. She responsibly directed these employees in order to make certain that all work was coordinated and completed on schedule. She directed them in the use of new forms and procedures. Lamb was also authorized to, and did, grant time off to employees and recommend that they be given extra vacation time where necessary.³ We find that the exercise of such authority by Lamb was not of a merely routine or clerical nature, but rather required the use of independent judgment.

In addition to the above-noted facts which are indicative of Lamb's supervisory status, her special position in the office convinces us, unlike the Trial Examiner, that Lamb possessed authority greatly in excess of that possessed by other employees in the auditing department. Thus, according to the testimony of Gerling, an auditing department

² Stone cited six specific instances in which Lamb's recommendation was sought with respect to the hiring of new employees. Her recommendations were generally followed. Stone testified that he could not recall any instance when he hired a new employee without first consulting Lamb. On one occasion, according to Stone, he accepted Lamb's recommendation to discharge a certain employee. (There is no indication in the record that more than one such recommendation was ever made by Lamb.)

³ Lamb made two such recommendations. Both were followed.

employee, it was Lamb to whom all notices of resignation were given. It was Lamb who screened all incoming mail to decide whether it should be transmitted to Stone or whether she should handle it herself. In addition, Lamb acted as "head" of the office when Stone was out on business, which occurred 50 percent of the time, and when he took his annual 2-week vacation.⁴ Only Stone and Lamb had keys and, consequently, access to Stone's desk and the contents therein. "Answering the telephone," erroneously alluded to by the Trial Examiner as an indication that Lamb's work was routine in nature, actually consisted of finding and relaying detailed information at the request of heads of other departments, all of such calls having been directed specifically to Lamb.

We are of the opinion that the preponderance of credible evidence supports the position of the Respondent. Accordingly, we find that Lamb was a supervisor within the meaning of Section 2(11) of the Act, and, therefore, that the Respondent was lawfully entitled, under the circumstances herein, to discharge Lamb for failure to obey her superior's instructions. We shall order that the complaint be dismissed in its entirety.

Having found that Jewel Lamb was a supervisor, we hereby sustain the Employer's challenge to her ballot. As the Petitioner failed to receive a majority of the valid ballots cast, we shall certify the results of the election.

[The Board dismissed the complaint in Case No. 14-CA-2045.]

[The Board certified that a majority of the valid ballots was not cast for Local 688, Warehouse & Distribution Workers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and that this Union is not the exclusive representative of the employees at the St. Louis, Missouri, pool stock warehouse of Sears, Roebuck and Company in the unit heretofore found by the Board to be appropriate in Case No. 14-RC-3463.]

CHAIRMAN LEEDOM and MEMBER JENKINS took no part in the consideration of the above Decision, Order, and Certification of Results of Election.

⁴ The Trial Examiner, relying on Lamb's testimony, found that she was not authorized to make "decisions" when acting as head of the office. We find it questionable that a person in charge of an office in excess of 50 percent of the year is not empowered to make "decisions" on *any* of the matters which may arise. In fact, it is undisputed that Lamb was authorized to initial various vouchers and balance sheets in Stone's absence, where such initialing indicated approval of the accuracy thereof.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

On January 7, 1959, Local 688, Warehouse & Distribution Workers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers

of America, filed a charge in Case No. 14-CA-2045. On January 9, 1959, a Board-conducted election was held in Case No. 14-RC-3463. On March 26, 1959, the General Counsel of the National Labor Relations Board issued and served a complaint in the first mentioned case, and thereafter Sears, Roebuck and Company filed its answer to said complaint. Pursuant to a Board order issued May 22, 1959, directing that under certain specific circumstances a hearing be held to determine the eligibility of one Jewel Lamb to vote in the said election, the Regional Director for the Fourteenth Region on June 11, 1959, issued an order consolidating the above-entitled cases and a notice of consolidated hearing. Pursuant to said order, a hearing was held in St. Louis, Missouri, on August 18 and 19, 1959, before the duly designated Trial Examiner.

The complaint alleges and the answer denies that the Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) by discharging and refusing to reinstate the above-mentioned Jewel Lamb. In both cases only a single major question is involved: Whether or not the said Jewel Lamb at the time of her discharge was an employee within the meaning of the Act, as alleged by General Counsel, or a supervisor within the meaning of the Act, as claimed by the Employer.

All parties were represented at the hearing by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. Opportunity for oral argument was waived. Briefs have been received from all parties.

After the close of the hearing a motion was received from counsel for the Employer to correct the official transcript in accordance with an attached stipulation signed by all parties. Said motion is hereby granted, and the motion and accompanying stipulation are hereby made a part of the record.

Upon the entire record thus made, and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Sears, Roebuck and Company is a New York corporation with its principal office in Chicago, Illinois. It is engaged in the business of retail sales and retail mail-order sales. During the calendar year 1958, it had a gross volume of business amounting in value to more than \$500,000.

The Employer operates a warehouse at 1024 South Vandeventer Avenue, St. Louis, Missouri, and is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 688, Warehouse & Distribution Workers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization admitting to membership employees of the Employer.

III. THE UNFAIR LABOR PRACTICES

A. *The status of Jewel Lamb*

Since ultimate conclusions in each of the two cases may only be reached after determining the employee status of Jewel Lamb, that point will first be considered.

There is no dispute as to the fact that for a period of about 10 years, on the critical date of November 21, 1958, Jewel Lamb had held the title of auditing supervisor in the auditing or pool stock controller office in the South Vandeventer Avenue warehouse at St. Louis. There is sharp dispute as to whether or not this title is and has been more than merely nominal.

Having fully considered and appraised all the testimony and other evidence in the record, as well as the comprehensive briefs filed by all parties, the Trial Examiner is of the opinion that the preponderance of credible evidence sustains the position urged by General Counsel, and that in fact Jewel Lamb was an employee, and not a supervisor, within the meaning of the Act.

This conclusion is based upon the following facts and factors:

1. Throughout this long period Lamb has worked alongside and with seven or eight other girls in a small, open area under the direct supervision of an auditor, or pool stock controller, who, during the earlier years, was Albert A. Hunt, and since 1953 has been Walter E. Stone.

2. All work in this office, including that of Lamb, is routine in nature and in accordance with the Employer's standardized operating procedure. In general, Lamb's duties include making ledger entries and filling in for other girls in the

office when they are absent. According to Stone's testimony Lamb spends from "twenty-five to thirty percent of her time" performing "paperwork of the same sort as . . . performed by the other employees," about 50 percent of her time in "paperwork" somewhat different in nature from that of the other employees (such as compiling reports consolidated from work performed by other girls and the final balancing of "the number of journal entries"), and the balance of the time in "answering the telephone," "answering questions from the girls," "helping the girls physically on some thing that had to be done," and conferring with Stone "relative to the office."

3. Throughout this long period, also, and despite her title of "supervisor," Lamb has been paid—not on a salary basis as is Stone—but on an hourly basis, and weekly in cash, as are other girls in the office. She was required to punch a time-clock and like other employees was "docked" for time off—requirements not imposed upon Stone.

4. When given the title of "auditing supervisor" Lamb was accorded a wage raise of \$3 a week, but when discharged in November 1958, appears to have been receiving pay in accordance with a scale equal to that of other girls in the office, longevity of service being considered. Although receiving \$12 per week more than the next-highest paid employee at that time, Stone admitted as a witness that Lamb had about 4 years more seniority than that employee, and Lamb's testimony is unrefuted that in each of her last 3 years she had received \$4 per week merit increases.

5. The testimony of Hunt, auditor, until Stone took over in this position, is unrefuted that when he informed Lamb of her promotion to "auditing supervisor," he did not "at any time tell her she had the power to hire, fire, to assign girls to permanent change of work, . . . to reward employees, to discipline employees, to lay off or suspend employees." In an affidavit executed by Stone after Lamb's discharge, this present auditor stated that "I did not ever specifically tell Jewel Lamb that she had this recommendatory authority with respect to hiring and discharges." As a witness, however, Stone said that he had "personally" told Lamb that "she had the right to effectively recommend hiring and firing," and explained the inconsistency between his testimony and the affidavit by stating:

At the time I originally made the statement that went into the affidavit . . . as I understood it, they were of no value since they were made after the official union's organizational campaign had been started so they would be of no value.

Stone's explanation thus supports Lamb's testimony to the effect that she was *never* told that she possessed even "recommendatory" authority until *after* the Union began organizing the employees in this department.

6. Lamb's testimony is undisputed that *after* being told she had such supervisory authority in respect to recommending hiring and firing, no action of this nature was taken in this department before her discharge. Nor was she given, at the time, any increase in wages.

7. Stone's own testimony makes it clear that not even he had authority to do more than recommend hiring or firing. It was the warehouse manager, not Auditor Stone, who informed Lamb of her discharge, as described more fully below, and Stone neither had been consulted in regard to this action nor had knowledge of the proposed action until just before it was made.

8. Although witnesses for the Employer claimed that Lamb had the authority to transfer employees, the claim is not supported by specific actions consonant with the possession of such authority. Lamb's testimony is not credibly refuted that on one occasion, when another department head had asked Lamb if he could "borrow" one of the auditing employees for a short time, Lamb inquired if one employee was busy and that employee, being free, went briefly to the other department. It appears that Stone was temporarily absent at the time. When he learned of the incident, he instructed both Lamb and the department head that "the next time anything like that happened to go to him in the future . . . any time anybody wanted to leave the office"

9. While it does appear that part of Lamb's duties down through the years has been occasionally¹ to "train" a new employee in the department, it is clear that this function followed normally from the fact that when given the title of "auditing supervisor" she was instructed to learn all of the work in the department, in order that she might fill in for other girls during their absence. There can be no dispute that in the field of experience in that office, she possessed more than even Stone himself. Experience in paperwork clearly is not determinative of supervisory capacity.

¹ In most instances, however, a new girl was trained by the employee leaving that job.

10. Not until a few days before her discharge was Lamb ever asked by higher authority, during the long period of holding her title, as to her opinion regarding proposed increases for other employees in the department.

11. Although Lamb acted as "head" of the office when Stone was out, her testimony is unrefuted that on such occasions no "decisions were made. And Stone admitted that when he was out, visiting other departments in the locality, if any "critical matter" came up, Lamb called him by telephone.

12. That the authority exercised, and not the title held, is the determining factor has been held by the Board in *Southern Bleachery and Print Works, Inc.*, 115 NLRB 787, among other cases.

13. The situation in regard to Lamb is in accord with that described as to leadmen by the Board in *Bagwell Electric Steel Castings, Inc.*, 117 NLRB 1770, where it said: ". . . any recommendations they make are acted upon on the basis of the admitted supervisors' own knowledge of the facts . . ."

14. As noted in point numbered 2, above, it is clear that Lamb had no appreciable amount of time in which she might have served as a supervisor within the meaning of the Act.

15. That Lamb on occasions acted as head of the small department of few employees during Stone's absence is not determinative of supervisory capacity. (See *Warren Petroleum Corporation*, 120 NLRB 370, 377.)

B. The discharge

The record contains small dispute as to the facts leading up to Lamb's discharge on November 21, 1958.

Sometime after the Union began organizing employees in this department Lamb was warned by George Walton, an official in the Employer's employee relations department, and by George Smit, the warehouse manager, that because she was a supervisor she must not attend union meetings. Lamb continued to attend such meetings, a privilege accorded to employees by Section 7 of the Act.

On November 21 she was dismissed by Smit, who read to her the following statement:

We have not been satisfied with your over-all performance as supervisor. One of your main responsibilities as a supervisor is to represent this Company correctly in it's [sic] relationship with the employes you supervise. In recent months, you have not done this to our satisfaction and this unwillingness to meet your responsibilities is specifically evidenced by your attendance at union meetings. You were instructed that because of your responsibilities as a supervisor, you should not attend such meetings. You chose to disregard these instructions. This only added evidence to us of your attitude and unwillingness to properly function and meet your responsibilities. We have lost complete confidence in your ability to properly represent this company in your supervisory duties. Your inability and unwillingness to properly represent this Company as a supervisor makes it necessary for us to replace you with someone who can. We are therefore removing you from the payroll today.

Lamb has not been reinstated.

The Trial Examiner concludes and finds that Jewel Lamb, an employee within the meaning of the Act, was discriminatorily discharged by the Employer on November 21, 1958, and since then has been refused reinstatement because she engaged in union activities and to discourage membership in the Union, and that such action interfered with, restrained, and coerced employees in the exercise of rights guaranteed by the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Employer set forth in section III, above, occurring in connection with the operations of the Employer described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and free flow of commerce

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, the Trial Examiner will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It will be recommended that the Employer offer immediate and full reinstatement to Jewel Lamb, to her former or substantially equivalent position, without prejudice

to her seniority or other rights and privileges, and make her whole for any loss of pay she may have suffered by reason of the discrimination against her, by payment to her of a sum of money equal to that which she would normally have earned as wages from the date of the discrimination to the date of the offer of reinstatement, less her net earnings during such period, in accordance with the Board policy set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Crossett Lumber Company*, 8 NLRB 440.

It will further be recommended that the Employer, upon reasonable request, make available to the Board and its agents all payroll and other records pertinent to the analysis of the amount due as backpay.

Since the violations of the Act which the Employer committed are closely related to other unfair labor practices proscribed by the Act, and the danger of their commission in the future is reasonably to be anticipated from its past conduct, the preventive purposes of the Act may be thwarted unless the recommendations are coextensive with the threat. To effectuate the policies of the Act, therefore, it will be recommended that the Employer cease and desist from infringing in any manner upon the rights guaranteed employees by the Act.

As to the disposition of Jewel Lamb's ballot, an issue in Case No. 14-RC-3463, it will be recommended that the Employer's challenge of said ballot be overruled, and that her ballot be counted, since as an employee she was clearly eligible to vote.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. Local 688, Warehouse & Distribution Workers, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

2. By discriminatorily discharging employee Jewel Lamb to discourage membership and activity in the above-named labor organization, and thereby interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Employer was engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

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

[Recommendations omitted from publication.] *

John H. Harland Company¹ and Office Employees International Union, Local 386, AFL-CIO, Petitioner. *Case No. 12-RC-818.*
May 5, 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 Ernest W. Dean, Jr., hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Bean and Fanning].

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

1. The Employer is engaged in commerce within the meaning of the Act.

¹ The name of the Employer appears as corrected at the hearing.