

and Alphonso Delgado whole for any loss of pay they may have suffered by reason of the discrimination against them:

Elsa Pupo	Otmara Guerrero
Alberto Gonzalez	Cipriano Dopico
Leo Medford	Berta Gonzalez

All our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named or any other labor organization.

ALLURE SHOE CORPORATION,
Employer

Dated_____ By_____ (Representative) _____ (Title)

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

Employees may communicate directly with the Board's Regional Office, Ross Building, 112 East Cass Street, Tampa 2, Florida, Telephone Number, 223-4623, if they have any question concerning this notice or compliance with its provisions

King's Department Store, Inc. and Retail Textile Clerks Local Union No. 454, AFL-CIO. *Case No. 27-CA-1157. August 31, 1962*

DECISION AND ORDER

On May 14, 1962, Trial Examiner Herman Marx issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety, as set forth in the attached Intermediate Report. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief, and the Respondent filed a reply brief.

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 [Members Rodgers, Fanning, and Brown].

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 briefs, and the entire record in the case, and hereby adopts the findings,¹ conclusions, and recommendations of the Trial Examiner.²

[The Board dismissed the complaint.]

¹ With respect to the allegation of surveillance, we agree with the Trial Examiner's conclusion that the General Counsel failed to sustain his burden of proof. In this connection, we construe the Trial Examiner's findings as a resolution of credibility against the General Counsel's witnesses.

² We hereby correct the following inaccuracies in the Intermediate Report, which do not materially affect the Trial Examiner's findings, conclusions, or recommendations. Under "III B, The allegations of interference, restraint, and coercion," contrary to the Trial Examiner, we find that the record shows that Respondent's store manager, Gilcreast, assembled the employees for a meeting on the day following his return to Denver, rather than on the same day (see transcript, p 77). Also, contrary to the Trial Examiner we find that the record shows that the Board agent called employee Layton in the evening to make arrangements apparently for an interview during the day (see transcript, p 50), as Layton saw him the next morning.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

The complaint in this proceeding, issued by the General Counsel of the National Labor Relations Board (also termed the Board herein), alleges that an employer, Kings Department Store, Inc. (herein also called the Respondent or Company), has violated Section 8(a)(1) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151, *et seq.*, referred to below as the Act), by informing employees that it would engage in surveillance of a union meeting; interrogating employees concerning their union activities; and instructing an employee not to sign "a union authorization card." The Respondent has filed an answer which, in material substance denies that it engaged in the unfair labor practices imputed to it.¹

Pursuant to notice duly served by the General Counsel upon all parties entitled thereto, a hearing upon the issues in this proceeding has been held before Trial Examiner Herman Marx, at Denver, Colorado. The General Counsel and the Respondent appeared through, and were represented by, respective counsel; participated in the hearing; and were afforded full opportunity to be heard, examine and cross-examine witnesses, adduce evidence, file briefs, and submit oral argument. The Charging Party, Retail Textile Clerks Local Union No. 454, AFL-CIO (also called the Union herein), did not enter an appearance. I reserved decision upon a motion to dismiss the complaint, made by the Respondent after the close of the evidence. The findings and conclusions made below dispose of the motion. I have read and considered the briefs filed with me since the hearing.

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

FINDINGS OF FACT

I. NATURE OF THE COMPANY'S BUSINESS; JURISDICTION OF THE BOARD

The Company is a Massachusetts corporation; maintains its principal office in Boston, Massachusetts; is engaged in the business of operating "a multi-state chain of department stores," including a store in Denver, Colorado; and is an employer within the purview of Section 2(2) of the Act. The issues in this proceeding involve only the Denver store.

As stipulated at the hearing in this proceeding, the Respondent "in the operation of its Denver store, annually does a gross volume of business in excess of \$1,000,000, and annually receives goods and materials [valued] in excess of \$50,000 directly from sources outside the State of Colorado." By reason of the interstate shipments to the Denver store, the Respondent is, and has been at all times material to the issues in this proceeding, engaged in interstate commerce within the meaning of the Act. Accordingly, the Board has jurisdiction over the subject matter of this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

As stipulated at the hearing, the Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Prefatory statement

The Respondent's Denver establishment is "a self-service department store," engaged in selling a miscellany of products, including wearing apparel and household supplies and appliances, and employs approximately 75 persons. Its operations are directed by a store manager named James E. Gilcreast. He is assisted in his managerial functions by one Elvon H. Cohen, who has the title of assistant manager, serves as the store's personnel director, is vested with authority to hire employees, and has for some time acted as supervisor of one of the merchandise sales departments. As the Respondent concedes, Cohen and Gilcreast are supervisors within the meaning of Section 2(11) of the Act.

The issues require identification of only one other managerial staff member, and that is George F. Sajac, who is classified as a "department manager," and in that capacity, as Gilcreast testified, "is in charge of [the] women's ready-to-wear department"; supervises the work of its employees (numbering five, according to Gilcreast

¹ The complaint is based on a charge filed with the Board on January 23, 1962, by a labor organization named Retail Textile Clerks Local Union No. 454, AFL-CIO. Copies of the complaint and charge have been duly served upon the Respondent.

at one point, and about nine at another); and is responsible for the work that is done there. The duties of the employees include the arrangement of merchandise displays in accordance with Sajac's judgment and direction. Taking into account Sajac's overall responsibility for the functioning of the department, particularly his power to use judgment in directing the employees he supervises in the arrangement of merchandise displays for sales purposes, I hold, contrary to the Respondent, that Sajac is a supervisor within the meaning of Section 2(11) of the Act.

The Union began an organizational campaign among the Denver store's employees in the latter part of 1961, and in the course of its activities scheduled a meeting of employees for the evening of January 5, 1962, sending advance notification of the time, date, and place of the meeting, by mail, to some 50 employees. The meeting was held as scheduled, but only three employees attended.

B. *The allegations of interference, restraint, and coercion*

On the day of the scheduled union meeting, shortly before the store opened for business in the morning, two of the employees, Betty Shroll and Mary Allen, who are sisters (and whose different surnames are apparently marital) sought Sajac's advice about attending the meeting, doing so because they had previously worked for him and held him in high regard. At least part of the conversation was held within earshot of one or more employees in addition to Shroll and Allen.

The major issue in this proceeding, in my view, is whether Sajac, as the General Counsel claims, made a statement to the sisters to the effect that the Company would have the meeting under surveillance. As to that issue there is sharp division in the testimony, the General Counsel calling two employees, Shroll and another named Dorothy Layton, and the Respondent calling Allen and Sajac.

According to Shroll, she and her sister asked Sajac if their jobs would be jeopardized if they went to the meeting, and he responded that "there would be a spotter there," and that he knew at least seven or eight employees who would quit "if the union gets in." Layton testified that she came within earshot of the conversation "at the end or near the end of it," standing "probably five or ten feet away" from the participants; that "they were talking about . . . whether if anyone went, would they lose their job and be fired"; that "we were told that there would be someone there"; that the word "spotter" was used (by Sajac, according to Layton at a subsequent point); and that Sajac also said not "to do anything foolish," and that Gilcreast "would take care of things when he got back [from a trip to the East] and had a meeting."

Sajac's version is that the sisters asked him if the management would have anyone "at the meeting to see who would go there," and whether they would "be fired if they did go"; that he stated that as far as he was concerned "there wouldn't be anybody," and that "Mr. Gilcreast wouldn't be that stupid, to send somebody." In effect contradicting her sister as to the point at issue, Allen testified in much the same vein as Sajac.

Two other matters may be noted before passing on the credibility issue described above. One is that later in the same day, Shroll, bringing up the matter, talked to Cohen at the store on the subject of "spotters" at the meeting, either telling him that she would not go because one would be there, or asking him whether any would be present; and that he replied that he would not be at the meeting because all the employees were familiar with his car ("a little white convertible," as Shroll termed it).²

During the course of the day, also, Gilcreast, who had returned to his post that day after an absence from the city, assembled the employees at the store, after learning of the impending union meeting; told them that the Company was grateful for their efforts during the recent preholiday season; and outlined for his audience benefit programs the Company maintained for employees. One of the employees, alluding to the scheduled union meeting, asked Gilcreast whether employees would be discharged if they attended, and Gilcreast replied in the negative, telling the group that he "had never threatened them," and was not going to do so.

It is unnecessary to decide whether this assurance by the store manager would have the effect of nullifying any prior statement by Sajac, apparently a relatively

² Shroll and Cohen differ somewhat as to what the former said on the subject of surveillance. According to Shroll, she said that she would not come to the meeting because of "this spotter." Cohen testified that he could not remember whether it was Shroll who made the reference to "spotters," but that one of a group of "four people standing around a (cash) register," as he walked by, asked him whether the management would "have any spotters at the meeting." The variance need not be resolved, for the end result is the same.

minor supervisor, to the effect that the union meeting would be under management surveillance, for the General Counsel's claim that Sajac made a remark of that purport is not, in my judgment, established by evidence of preponderant weight. To be sure, Sajac is an interested witness, for he is a supervisor for the Respondent and it is the legality of conduct imputed to him that is under scrutiny and, moreover, Allen, who supports Sajac's version, has expressed opposition to the Union, among other employees; but, on the other hand, I am also unable to regard the General Counsel's witnesses, Shroll and Layton, as disinterested. Both have promoted sentiment for the Union among the other employees, participating actively in its organizational campaign.

Taking all factors into account, I can see no greater reason to accept the relevant testimony of Shroll and Layton than that of Sajac and Allen. There is no evidence of any hostility between the two sisters, and I observed none, and thus, in my view, Sajac's version gains weight from the fact that Allen supports his testimony rather than that of her sister.

Moreover, the support Layton gives Shroll does not appear to me to be compelling. Layton was called by the General Counsel on another matter during his case-in-chief, and gave no testimony at that time as to the point at issue. She was recalled by the General Counsel to testify regarding the matter after the Respondent had rested, the General Counsel explaining that at the time of her prior testimony he was unaware that Layton knew of "this conversation [between Sajac and the sisters] to the extent that she does." By that time, Layton had had an opportunity to hear the testimony of the three other witnesses on the subject. In the nature of things, one cannot tell how far her memory has been influenced by testimony she heard, but it is well to note that although she asserts that she came within earshot of the conversation "at the end or near the end of it," her version pursues much the same path as Shroll's on the subject of "a spotter," but that she omits matters (including Sajac's alleged remark about some employees quitting in the event of unionization) that in Shroll's account follow the subject. That is not to say that I believe that Layton willfully colored her account; rather, it is that I am unconvinced, upon my observation of the witness and the context in which she gave her relevant testimony, that she has a firm recollection of what took place, uninfluenced by testimony that preceded her account.

Nor does the fact that only three employees appeared at the union meeting lead me to believe Shroll and Layton rather than Sajac and Allen, for it would be sheer speculation to conclude that so few came because Sajac said the meeting would be under surveillance. Shroll quoted Sajac to other employees to that effect and conceivably some or many stayed away for that reason, but that does not prove that Shroll quoted Sajac accurately. Moreover, it may be that some, at least, did not come to the meeting because of lack of interest; perhaps because of Gilcreast's talk earlier in the day on the subject of benefit programs maintained by the Company for employees. In short, as regards the issue under discussion, I am unable to attach any operative weight to the fact that very few came to the meeting.

The sum of the matter is that the General Counsel has the burden of proving his claim that Sajac made a statement to the effect that the union meeting would be under surveillance; that he has failed to carry the burden with evidence of preponderant weight; and that thus the relevant allegations of the complaint must be dismissed.³

³At one point, Sajac testified: "And I told them as far as I am concerned there wouldn't be anybody [from management at the union meeting], and I mean there might be and might not be, but as far as I was concerned, there wouldn't be." (Emphasis supplied.) Allen does not quote Sajac as telling her and Shroll that "there might be and might not be" a management representative at the meeting, and the General Counsel, in his brief, sees in this variance a weighty factor militating against acceptance of the testimony of both Sajac and Allen. However, it is not all clear that Sajac meant to quote himself as telling Shroll and Allen that "there might be and might not be" management surveillance of the meeting. Rather, the phrase "I mean there might be and might not be" appears to me to be an interpolation in his testimony of what he meant by his statement that "as far as I am concerned there wouldn't be anybody" from management at the meeting. That Sajac did not intend to quote himself as telling the sisters that "there might be" management surveillance is evident from the fact that he quotes himself as remarking to the sisters that "even Mr. Gilcreast wouldn't be that stupid." In any case, the emphasis the General Counsel places upon the variance between the Sajac and Allen versions appears to me to be a clutching at straws, for both accounts, taken as a whole, are in basic accord, their sense being that Sajac was asked by the sisters whether the management would have the meeting under surveillance, and that he replied in the negative.

Particularly in the light of these conclusions, the record will not support a finding that the Respondent violated the Act as a result of Cohen's remark to Shroll to the effect that he would not be at the meeting because his car was familiar to the employees. The General Counsel's thesis appears to be that this was tantamount to a statement that the meeting would be under surveillance by another management representative. However, it was Shroll who broached the subject of surveillance to Cohen, and his reply appears to me to have been no more than an offhand means of waving the subject aside. Cohen testified to as much, stating that he was "just disengaging myself from the conversation." I find this credible in the light of undisputed testimony by Gilcreast that all supervisory personnel were under instructions from him to take a neutral position as regards unionization in discussions with employees, and that he told the assembled employees on January 5 that they would not be discharged or threatened if they attended the union meeting. In sum, in the perspective of the whole record, I am unable to view Cohen's remark as a substantial basis for a finding that the Respondent, through Cohen, unlawfully "informed employees that [it] would engage in surveillance of a forthcoming union meeting."

On January 16, 1962, the Company filed with the Board's Denver Regional Office a charge against the Union alleging violation of Section 8(b)(7)(C) of the Act as a result of unlawful picketing to secure organization of the employees and recognition by the Company, and the firm's attorney conferred regarding the matter with an investigator on the Regional Office staff. As undisputed evidence establishes, the investigator, in connection with processing of the charge, asked, during the discussion, that the Company secure "and supply the names of the employees who had been contacted by the Union," and the attorney thereupon, while still in the Regional Office, called Cohen, the personnel manager, and asked him "to ascertain the names of those who had been contacted by the Union," and to send the information to the investigator at the Regional Office.

Later that day or on the following day, Cohen asked a department supervisor named Lesser if anyone in his department had been approached by the Union, and Lesser supplied the name of June Lovitt, an employee, who had previously asked him if anyone would be discharged for attending the union meeting. (Lesser had replied in the negative.) Cohen shortly thereafter sought out Lovitt and asked her if the Union had been in touch with her, and she replied that "all of the girls had had letters" from the Union as far as she knew. Cohen also inquired whether the organization had called her home and had sent anyone there, to which she replied that a representative of the Union had spoken to her husband on the telephone, while she was absent, and that no one from the Union had visited her home.⁴

The Respondent argues, among other things, that the interrogation of Lovitt is but an "isolated" incident not warranting a finding that it violated the Act. It is true that the General Counsel rested his case-in-chief as regards interrogation solely on the questioning of Lovitt, but there is also evidence, given by Cohen under cross-examination during the Respondent's case, that he interrogated a number of employees in somewhat the same vein as he questioned Lovitt, and for the same reason. In any case, whether or not one takes all the acts of interrogation into account, it seems to me that a finding that the Respondent violated the Act as a result of any of Cohen's questions is unwarranted in view of the Government's role in the matter. To be sure, there is no indication that the General Counsel's representative told the Company's attorney in so many words that it should secure the desired information from the employees, but on the record as made, it was not unreasonable for the Company to seek to comply with the investigator's request in the manner that it did, for, obviously, the best available sources of the information the investigator requested were the employees themselves. Indeed, one would be hard put to it to suggest any other effective way that the Company could secure the information that

⁴Lovitt testified that the interrogation occurred "around the first part of January"; and Cohen agreed at one point with a suggestion by counsel that he spoke to Lovitt on January 9. The General Counsel makes a point of this testimony, arguing from it that the interrogation of Lovitt occurred before the filing of the Company's charge and thus had no connection with it. However, in my view Lovitt's broad estimate does not conclusively establish that the interrogation occurred before the filing of the charge, for there is testimony by Cohen, ignored in the General Counsel's brief, that he "believe(s) it (his conversation with Lovitt) was around January 9th. It was after I had received a call from our lawyer, Mr. Kitchen" (Emphasis supplied) In the perspective of the whole record, I think it likely that the interrogation took place after the Company's charge was filed on January 16, and as a result of the attorney's telephone call from the Regional Office, and I have thus made corresponding findings

Government's representative sought. One may reasonably believe that the Union would be an unlikely source, and, of course, surveillance of union activities by an employer is forbidden.

In other words, without intending any implication that the investigator was in any way remiss in the performance of his duty, it is my view, from what appears in the record, that, in a practical sense at least, it was the Government itself, albeit unwittingly, that set the Company on its course of interrogating employees; and thus I conclude that it would not effectuate the policies of the Act to impute any violation of the statute to the Respondent as a result of the interrogation, and shall, for that reason, apart from any other factor, recommend dismissal of the relevant allegations of the complaint.⁵

The remaining question is whether the Respondent violated the Act by instructing an employee "not to sign a union authorization card." The background for that issue is that an attorney on the staff of the General Counsel, in the course of investigating the charge in this proceeding, telephoned Layton about February 1, 1962, to make arrangements to interview her in the evening after work; that she was uncertain that her caller was actually a representative of the Government and because of her uncertainty was afraid to admit a stranger to her home while alone there at night; and that she informed Cohen of the telephone call and asked his advice in the matter.

There is some conflict in the evidence as to Cohen's reply. Both he and Layton are in accord that he advised her to be certain of her caller's "identification," but, in addition, Layton testified on direct examination that Cohen also told her "not to sign any cards or anything." It may be noted that her direct testimony does not, in terms at least, mention "a union card" or "a union authorization card," nor any claim that she expressed suspicion to Cohen that her caller was a representative of the Union. It was not until her cross-examination, in response to leading and suggestive questions, that she agreed that she suspected that her caller was a representative of the Union, that she informed Cohen of her suspicion, and that "in that connection," he told her "not to sign a union card."⁶ Be that as it may, Cohen denies that he mentioned "a union card," and quotes himself as advising Layton not to "sign anything unless you know what you are signing."

As with the other allegations of unfair labor practices, the General Counsel has the burden of proving the instructions he imputes to Cohen by evidence of preponderant weight. Bearing that in mind, the testimony of Layton does not appear to me to outweigh that of Cohen in the scales of probability. Indeed, his version seems to me to provide a more substantial basis for findings as to the advice he gave than does Layton's testimony. The thrust of Layton's account, on direct examination, of her quest for advice is that she was afraid to admit a stranger to her home at night merely on the basis of his representation on the telephone that he was a Board agent and wished to interview her regarding a Board proceeding, and that she asked Cohen for advice in the premises. It appears to me to be somewhat more natural that in response to such a quest, he would advise Layton, as he claims, to assure herself of her caller's identification, and of the contents of anything she signed, than that he would specify that in addition to making certain of the Board agent's identification, Layton should not sign "a union card." Moreover, the fact that Layton departed, under cross-examination, from her initial account of the terms of the advice she sought, and of the counsel she received, serves to weaken the credibility of her relevant testimony.

The sum of the matter is, to say the least, that I see no reason to accord greater credence to Layton's claim that Cohen told her not to sign a "union card" than to Cohen's disclaimer that he did so, and to his account of what he said; and for that reason alone, I must hold that the General Counsel has not sustained the burden of

⁵ By the conclusion reached on the interrogation issue, I do not pass on the existence of any right by an employer to question his employees regarding union activities in order to support, or to counter, a charge filed under the Act or any position in prospective or pending litigation. Any question of the existence of such a right is not reached in this proceeding, for I hold no more than that because the interrogation, in the particular circumstances presented, was a natural outgrowth of the Government's request for information, it would not be proper for the Government to place the stigma of statutory violation on the Respondent.

⁶ In passing, I note that I have some difficulty, to say the least, in reconciling Layton's testimony that she is an active proponent of the Union with the account she gives, under cross-examination, that she suspected that her caller might be a representative of the Union and sought Cohen's advice in that connection.

proving his relevant claim, and that the allegations under discussion should therefore be dismissed.⁷

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

CONCLUSIONS OF LAW

1. The Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

2. The Company is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.

3. The record does not establish that the Company committed the unfair labor practices imputed to it in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record in this proceeding, it is recommended that the Board enter an order dismissing the complaint.

⁷In view of the conclusions reached above regarding the conversation between Cohen and Layton, I see no need to determine whether Layton's testimony spells out an instruction not to sign "a union card," as distinguished from advice or a suggestion not to do so, nor whether such advice, suggestion or instruction, whatever label one would apply to the relevant statement Layton imputes to Cohen, is privileged under Section 8(c) of the Act, which provides that the expression of "views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

Local No. 92, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO [R. W. Hughes Construction Co., Inc.] and C. V. Stelzenmuller, attorney

C. H. Green, business agent of Local No. 92, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and C. V. Stelzenmuller, attorney. Cases Nos. 10-CB-1314-1 and 10-CB-1314-2. September 4, 1962

DECISION AND ORDER

On May 23, 1962, Trial Examiner A. Bruce Hunt issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative actions, as set forth in the attached Intermediate Report. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.

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 [Chairman McCulloch and Members Leedom and Brown].

The Board has considered the Intermediate Report, the exceptions and brief, and the entire record. The Board hereby affirms the Trial