

**Holyoke Cinema Shops, Inc.; Miracle Mart, Inc. (a Michigan corporation); Miracle Mart, Inc. (a Pennsylvania corporation); Miracle Mart, Inc. (an Indiana corporation); Miracle Mart, Inc. (a Virginia corporation); Miracle Mart of Kingston, Inc.; Miracle Mart of Detroit, Inc.; Miracle Mart of Joy, Inc.; Miracle Mart of Warren, Inc.; Miracle Mart of Johnstown, Inc.; Miracle Mart of Muskegon, Inc.; Miracle Mart of Muncie, Inc.; Allen Fur Company, Inc. d/b/a Miracle Mart; Riga, Inc. d/b/a Franklin Discount Department Store and Retail Clerks International Association, AFL-CIO**

**Amalgamated Clothing Workers of America, AFL-CIO; Central States Joint Board, Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO; Kentuckiana Joint Board, Amalgamated Clothing Workers of America, AFL-CIO (Holyoke Cinema Shops, Inc., et al.) and Local 1441, Retail Clerks International Association, AFL-CIO. Cases Nos. 25-CA-1432 and 25-CB-467. November 26, 1962**

#### DECISION AND ORDER

On July 19, 1962, Trial Examiner C. W. Whittemore 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 action, as set forth in the attached Intermediate Report. Thereafter, the Respondent Unions and the General Counsel filed exceptions to the Intermediate Report and briefs in support thereof.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in these cases, including the Intermediate Report, the exceptions and briefs, and finds merit in the exceptions of the Respondent Unions. Accordingly, the Board adopts the findings of the Trial Examiner only insofar as consistent with this Decision and Order.

The Trial Examiner found that Respondent Employers, herein called the Company, by rendering "substantial assistance" to Respondent Unions, herein called Amalgamated, in their organizing campaign at the newly established Miracle Mart store in Muncie, Indiana; by refusing "similar assistance" to the Retail Clerks, the Charging Par-

ties herein; and by entering into a union-security contract with Amalgamated "under such conditions," violated Section 8(a) (1), (2), and (3) of the Act. The Trial Examiner also found that, by entering into the union-security agreement with the Company, Amalgamated violated Section 8(b) (1) (A) and (2). For the reasons stated below, we disagree with these findings.

1. The Trial Examiner found initially that on August 1, 1961,<sup>1</sup> Charles Breihof, general manager and labor relations director of the Company, agreed with Max Ungar, a representative of Amalgamated, that three women organizers, who were also experienced "discount girls," would be put on the payroll of the Company's Muncie store to do "quiet, efficient" organizing; that "pursuant to this arrangement" union organizers Howard, Ice, and Denham were hired; and that, by this conduct, the Company violated Section 8(a) (1) and (2) of the Act. We do not agree. Even assuming, as the Trial Examiner found, that Breihof arranged with Ungar to hire three union organizers, we are not satisfied that the record establishes that the three named employees, were hired "pursuant to this arrangement." We find, rather, that these individuals were hired by Store Manager Lester LaVictor in the normal course of the Company's business. Thus, Breihof, who was the General Counsel's principal witness on this point, testified that LaVictor did all the hiring at the Muncie store and that LaVictor hired the three individuals. Ice and Denham corroborated this testimony that they were hired by LaVictor.<sup>2</sup> Nor does the record otherwise show that LaVictor knew anything of the alleged agreement between Breihof and Ungar, that he hired the three employees pursuant to such agreement, or that these employees received any different treatment than other job applicants. On the contrary, the record discloses that at the time they were hired, the Company was in the process of hiring a large complement of employees in connection with the opening of its Muncie store. As the record does not show that they were hired pursuant to any "arrangement" or for any reason other than the fact that they were needed to do the work required at the Company's Muncie store, we do not find this employment to be unlawful. Nor would such arrangement between Breihof and Ungar standing alone, be unlawful. At most, it would indicate an intent to violate the Act. However, the Board has held that mere intent to engage in unlawful conduct, in a context like that presented here, is not an unfair labor practice.<sup>3</sup> We shall therefore dismiss those allegations of the complaint relating to the hiring of Howard, Ice, and Denham.<sup>4</sup>

<sup>1</sup> Unless otherwise stated, all dates herein are in 1961.

<sup>2</sup> Howard and LaVictor did not testify at the hearing.

<sup>3</sup> *B. M. Reeves Company, Inc.*, 128 NLRB 320

<sup>4</sup> In view of our findings herein, we deem it unnecessary to decide whether in fact Breihof and Ungar entered into an agreement on August 1.

2. The Trial Examiner further found that the Company rendered unlawful assistance to Amalgamated in that Breihof was aware of the organizing efforts of employees Howard, Ice, and Denham, but did nothing to interfere with these activities. While Breihof admitted that he had general knowledge of union organizing efforts directed towards employees at the Muncie store, there is no specific evidence that Breihof or any other supervisor knew of any organizing activity occurring on company time or on the store premises. Breihof testified that he did not see any of the three organizers engaging in union activity during working time and that, although supervisory employees were instructed to report to him any union activity occurring on store premises, no organizing activity was so reported.<sup>5</sup> As the record does not indicate that the Company assisted Amalgamated in its organizing activities, we shall also dismiss these allegations of the complaint.

3. The Trial Examiner also found that the Company violated Section 8(a) (1) and (2) of the Act by refusing to allow representatives of Retail Clerks to "sign the employees" at the Muncie store on August 7 and 15, and by refusing a "similar request" on August 18, while during the same period the Company was rendering assistance to Amalgamated. We disagree. As we have already found that the Company did not hire Amalgamated organizers pursuant to its alleged agreement and that the Company had no knowledge of any Amalgamated organizing activity taking place on working time or on company property, we find that the Company did not treat Retail Clerks disparately in such connection, by denying them assistance "similar" to that rendered to Amalgamated. Moreover, at no time until August 18, did Retail Clerks request permission to solicit the Company's Muncie employees for organizational purposes. Rather, the record establishes that the Retail Clerks in effect sought to obtain recognition at the Muncie store on the purported basis, that its Fort Wayne contract <sup>6</sup> with the Company covered the Muncie operation.

<sup>5</sup> Although Breihof testified that LaVictor reported to him that an employee had asked LaVictor about the propriety of this employee going to a union dinner which was to be held after working hours, there is no evidence linking this inquiry with any organizing efforts taking place on company time or on company premises.

Breihof also testified that there was a "broad" no-solicitation rule in effect at the Muncie store. However, as we find that the Company had no knowledge of any organizing activity by Amalgamated on company time or premises, no finding of unlawful assistance by the Company to Amalgamated may be based on the Company's failure to enforce this rule against Amalgamated.

<sup>6</sup> The Fort Wayne agreement was entered into November 10, 1960, between Miracle Mart, Inc. of Fort Wayne, Indiana, and the Retail Clerks Union Local No. 10, an affiliate to the Retail Clerks International Association, AFL-CIO, one of the Charging Parties in the present cases. This agreement covered "employees presently employed and those employees hired in the future in stores now or hereafter owned and/or operated by the Employer in the 65-mile area of Fort Wayne, Indiana." However, the General Counsel does not contend that the Muncie store was in fact an accretion to the Fort Wayne unit or that Respondent Company violated the Act by rejecting the Retail Clerks' demand for recognition at the Muncie store, in reliance on this contract.

We find that the Company did not unlawfully refuse access to Retail Clerks.

4. The Trial Examiner further found that by entering into a union-security agreement on August 16 under the above circumstances, the Company and Amalgamated violated 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2), respectively. The Trial Examiner's conclusion that the Respondents unlawfully entered into this agreement is predicated solely on his finding that, prior to entering into this agreement, the Company had unlawfully assisted Amalgamated and, therefore, on August 16, Amalgamated did not represent an uncoerced majority of the Company's employees. However, we have found that the Company had rendered no unlawful assistance to Amalgamated prior to the signing of the agreement on August 16. Moreover, the record shows that on August 15, a neutral party conducted an independent card check and certified that Amalgamated represented a majority of the Muncie employees. Relying on this card check, the Company, on August 15, recognized Amalgamated as the exclusive bargaining agent for its Muncie employees, and, on August 16, the Company and Amalgamated entered into a collective-bargaining agreement containing an agency-shop provision.<sup>7</sup> Under these circumstances, we find that the Respondents did not violate the Act by entering into such a collective-bargaining agreement on August 16.

As we have found that the Respondents have not violated the Act, we shall dismiss the complaint in its entirety.

[The Board dismissed the complaint.]

MEMBER LEEDOM, dissenting:

I would adopt the Trial Examiner's ultimate conclusion that Respondent Company and Respondent Amalgamated have, respectively, violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act. The record shows that in Indiana, a right-to-work State, Respondents entered into an agency-shop agreement. Such an agreement, in my opinion, is unlawful under the Act which we administer.<sup>8</sup> Respondent Company has therefore unlawfully interfered with the Section 7 rights of its employees, unlawfully assisted Respondent Amalgamated, and unlawfully discriminated against its employees; and Respondent Amalgamated has unlawfully restrained and coerced such employees and caused Respondent Company to discriminate against them. Consequently, and without passing on the issues decided by my colleagues, since the remedy would in any event be substantially the same, I dissent from their decision to dismiss the complaint.

<sup>7</sup> For the reasons set forth in the majority opinion in *General Motors Corporation*, 133 NLRB 451, enf. denied 303 F. 2d 428 (C.A. 6), we find that such agency-shop clause is not unlawful.

<sup>8</sup> See my dissenting opinion in *General Motors Corporation*, *supra*, at 461-464.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

An original charge in Case No. 25-CA-1432 was filed by the Retail Clerks on August 18, 1961. It was duly served upon the parties. A first amended charge in the same case was filed on January 22, 1962. An original charge in Case No. 25-CB-467 was filed jointly by nine locals of the Retail Clerks, and a first amended charge in the same case was filed on January 22, 1962. On January 26, 1962, the General Counsel of the National Labor Relations Board issued an order consolidating the two cases, a complaint and a notice of hearing thereon. Answers were thereafter filed by the various Respondents. The complaint alleges and the answers deny that the Respondent Employers have engaged in unfair labor practices in violation of Section 8(a)(1)(2) and (3) of the National Labor Relations Act, as amended, and that the Respondent Unions have engaged in unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act. Pursuant to notice, a hearing was held in Muncie, Indiana, on April 10 and 11, 1962, before Trial Examiner C. W. Whittemore.

At the hearing all parties were represented by counsel and were afforded full opportunity to present evidence pertinent to the issues, to argue orally, and to file briefs. Briefs have been received from all parties except the Respondent Employers.

Disposition of the Respondent Unions' motion to dismiss the allegations of the complaint against them, upon which ruling was reserved at the hearing, is made by the following findings, conclusions, and recommendations.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT EMPLOYERS

The Respondent Employers, listed immediately below, are corporations existing by virtue of the laws of the respective States listed beside each, and operate retail department stores in cities also noted beside each name:

Establishment	State	Location	Trade name
Respondent Michigan	Michigan	Grand Rapids	Miracle Mart
Respondent Pennsylvania	Pennsylvania	Reading	Do
Respondent Indiana	Indiana	Fort Wayne	Do.
Respondent Virginia	Virginia	Richmond	Do.
Respondent Kingston	Pennsylvania	Kingston	Do.
Respondent Detroit	Michigan	Detroit	Do
Respondent Joy	do	do	Do.
Respondent Warren	do	Warren	Do.
Respondent Johnstown	Pennsylvania	Johnstown	Do.
Respondent Muskegon	Michigan	Muskegon	Do.
Respondent Muncie	Indiana	Muncie	Do.
Respondent Allen	Pennsylvania	York	Do.
Respondent Riga	do	do	Franklin Discount Department Store.
Respondent Holyoke	Massachusetts	Holyoke	John Edwards Clothes

Each of the above-named Respondents annually sells products of more than \$500,000 in value. Each of them, except the Respondent Holyoke, annually causes to be transported to it, in interstate commerce, products valued at more than \$100,000. Holyoke annually causes goods valued at more than \$50,000 to be shipped to it in interstate commerce.

The Respondent Holyoke owns a majority of the outstanding shares of all the named corporations. Irvin Bernstein is president and George Desser is secretary of all the corporations. The directors of all the corporations are: Irvin Bernstein, George Desser, Edith Bernstein, and Sarah Desser.

Receipts from the sale of merchandise by all corporations named above are deposited in banks at the location of each, but Irvin Bernstein and Desser are the only persons authorized to withdraw such funds.

The foregoing facts were stipulated to by all parties. It is therefore found that the Respondent Employers, and each of them, are engaged in commerce within the meaning of the Act.

## II. THE LABOR ORGANIZATIONS INVOLVED

Amalgamated Clothing Workers of America, AFL-CIO; Central States Joint Board, Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO; Kentuckiana Joint Board, Amalgamated Clothing Workers of America, AFL-CIO; and Retail Clerks International Association, AFL-CIO, are Labor organizations within the meaning of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. *Setting and major issues*

All of the conduct claimed by General Counsel to be violative of the Act occurred at Muncie, Indiana, within a period of a few days before and upon the opening for business of a new discount store at this location. In preliminary summary, the facts established by the undisputed testimony of Charles Breihof, former general manager of the chain of stores, depict the unsavory spectacle of collusion between an employer of national scope and labor organizations of international jurisdiction to deprive employees of their rights, guaranteed by Section 7 of the Act, to select, if any, their own collective-bargaining representatives.

Such collusion consisted of an oral agreement between Breihof and an Amalgamated representative, even before the Muncie store opened, whereby Amalgamated organizers would be hired as employees for the specific purpose of soliciting regular employees to join that labor organization. The agreement was fulfilled and, as noted below, resulted in an exclusive-recognition contract between management and the Amalgamated. General Counsel not only contends that such conduct was violative of several sections of the Act, but also urges that a broad "cease and desist" preventive order be issued against all corporations owned and controlled by Bernstein and Desser, as named herein.

### B. *The facts*

In mid-August 1961 Charles Breihof was the general manager and labor relations director of all 14 stores listed herein. His authority was subordinate only to Irvin Bernstein and George Desser, previously identified as president and secretary of all corporations. Breihof retained these positions and authority until March 1962. According to his undisputed testimony, corroborated by certain sworn statements previously made before a Board agent which General Counsel properly characterized as admissions against interest, the following material events occurred:

(1) Breihof first came to Muncie in July, to oversee the preparations for opening a new store in that city. He transferred Lester LaVictor from the Fort Wayne, Indiana, store to be resident manager at Muncie.

(2) About August 1, Breihof met with Max Ungar, a representative of the Respondent Central States. Ungar requested and Breihof granted permission to have three women organizers, who were also experienced "discount girls," put on the Muncie payroll and do "quiet, efficient" organizing.

(3) Pursuant to this arrangement, Union Organizers Howard, Ice, and Denham were hired. (Ice is head of a Louisville, Kentucky, Local of Amalgamated, Denham a delegate to the Respondent Kentuckiana.)

(4) The organizing efforts of these three, of which Breihof admitted he was aware, were not interfered with by management.

(5) On August 12, Breihof returned to his headquarters in Grand Rapids, Michigan, and Bernard Bernstein, brother of Irvin Bernstein, came to Muncie to oversee the actual opening of the store to the public.

(6) During the next 2 or 3 days Breihof was in telephonic communication with Bernstein and a union representative in Muncie, concerning steps to be taken in arranging for a card check of Amalgamated authorization cards,<sup>1</sup> oral recognition, and setting up negotiation meetings.

(7) Breihof met with Ungar on August 16, in Cleveland, Ohio, and an exclusive-recognition contract, covering the Muncie store, was executed. The contract also contains a union-security clause.<sup>2</sup>

<sup>1</sup> The authorization cards were applications for membership in the parent International.

<sup>2</sup> The contract was signed by Ungar and Marsella, as representatives of the Respondent Central States.

In marked contradistinction to the open assistance thus accorded Amalgamated representatives, the undisputed testimony of an official of the Retail Clerks, R. B. Lewis, shows that:

(1) On August 7 Lewis and another representative of the same labor organization went to Store Manager LaVictor, and "requested permission to sign the employees." Lewis informed LaVictor that he had previously been in communication with Attorney Burns, in Detroit, who had negotiated an earlier contract between his client, the Miracle Mart store in Fort Wayne, Indiana, and the Retail Clerks, and that Burns had informed him that the parties had agreed that when opened the Muncie store would be covered by the same Fort Wayne contract. LaVictor, however, told Lewis that he had had no word about this matter from company officials, and declined to permit him to "talk to the employees."

(2) On August 15, the day before its public opening, Lewis again went to the Muncie store. He approached Bernard Bernstein, claimed that the Fort Wayne contract covered Muncie, and requested "the right to sign these employees in the store." Bernstein refused such permission, and ordered Lewis from the store.

(3) A similar request to Bernstein was refused on August 18, and by police order Lewis was ordered from the premises.

### C. Conclusions

From these uncontradicted facts it is concluded that: (1) the Respondent Employers rendered substantial assistance to the Respondent Unions in their organizing at Muncie; (2) that similar assistance was denied the Retail Clerks; (3) by entering into an exclusive-recognition contract under such conditions the Respondents deprived the Muncie employees of rights guaranteed by Section 7 of the Act, the employer Muncie violating Section 8(a)(1) and the Union Section 8(b)(1)(A) of the Act.

As noted above, the contract entered into by the Respondents Muncie and Amalgamated contains a union-security clause. Although it appears that up to the date of the hearing no dues have been paid by members or that the equivalent of dues have been exacted from nonmembers, as the agreement requires, the execution of such a contract was clearly unlawful from its inception.<sup>3</sup> The proviso of Section 8(a)(3) permits a union-security clause under certain conditions, but not where the labor organization has been unlawfully assisted, as here, by an employer. It follows that by entering into this contract the employer violated Section 8(a)(3) by imposing discriminatory conditions upon employees to encourage membership in and support of a labor organization, while the Respondent Union, in causing or attempting to cause such discrimination violated Section 8(b)(2) of the Act.

General Counsel does not contend that there was, or is, merit in the claim made by the Retail Clerks, through its representative Lewis that the Fort Wayne contract lawfully covered Muncie employees.<sup>4</sup> Indeed, from the state of the record it appears that the Retail Clerks sought, but failed, to obtain the same unlawful assistance rendered a rival organization. It is clear that neither the employer nor the competing labor organizations at any material time gave consideration to the underlying purpose of the Act—the protection of employees' rights to choose, or not to choose, any labor organization as their bargaining representative. Thus the claims in the brief of Retail Clerks that the Respondents engaged in "shameful conspiracy" and "ran roughshod over employee rights" seems no more than the disgruntled and envious voice of the pot vilifying the kettle.

### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents, set forth in section III, above, occurring in connection with the operations of the Respondent Employers, and each of them, as 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 the free flow of commerce.

### THE REMEDY

Having found that the Respondents have engaged in unfair labor practices, the Trial Examiner will recommend that they cease and desist therefrom and take affirmative action necessary to effectuate the policies of the Act.

<sup>3</sup> *N.L.R.B. v. Revere Metal Art Co.*, 280 F. 2d 96, at 100, cert. denied 364 U.S. 894

<sup>4</sup> The Fort Wayne contract, in evidence, purports to cover an area far exceeding the unit certified by the Board.

General Counsel seeks a broad cease and desist order. The Trial Examiner believes there is merit in his contention that under the circumstances existing here, as a preventive measure such an order is fully warranted. There is no question but that this chain of discount stores is not only an expanding operation but a single, integrated enterprise, with central labor policy and control.

It will be recommended that the contract of August 16 between the Respondents be set aside, and that recognition of the Respondent Unions be withdrawn and withheld unless and until the said labor organizations shall have been certified as such representative by the Board.

Because of the nature of the unfair labor practices here involved, which occurred even before actual operations of the store began, it will be recommended that the Respondents cease and desist from infringing in any manner upon rights guaranteed employees by Section 7 of the Act.

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

#### CONCLUSIONS OF LAW

1. Amalgamated Clothing Workers of America, AFL-CIO; Central States Joint Board, Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO; Kentuckiana Joint Board, Amalgamated Clothing Workers of America, AFL-CIO; and Retail Clerks International Association, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

2. By contributing assistance and support to Amalgamated Clothing Workers of America, AFL-CIO; Central States Joint Board, Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO; and Kentuckiana Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, the Respondent Employers have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(2) of the Act.

3. By discriminating in regard to the terms and conditions of employment of their Muncie, Indiana, employees, thereby encouraging membership in and support of a labor organization, the Respondent Employers have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act, the Respondent Employers have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By causing and attempting to cause the Respondent Employers to discriminate against employees within the meaning of Section 8(a)(3) of the Act, the Respondent Unions have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

6. By restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent Unions have engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

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

[Recommendations omitted from publication.]

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**Robert S. Abbott Publishing Company and Chicago Newspaper Guild, Local 71, ANG, AFL-CIO**

**Robert S. Abbott Publishing Company and Chicago Newspaper Guild, Local 71, ANG, AFL-CIO.** *Cases Nos. 13-CA-4208, 13-CA-4208-2, 13-CA-4208-3, 13-CA-4208-4, 13-CA-4208-5, 13-CA-4208-6, 13-CA-4208-7, and 13-CA-4264. November 27, 1962*

#### DECISION AND ORDER

On December 8, 1961, Trial Examiner John H. Eadie issued his Intermediate Report herein, finding that the Respondent had engaged