

scribed above, the Spartan stores resemble in their physical aspects a single retail department store. The Board's long-established policy in cases involving retail department stores is to find all inclusive units appropriate.⁷ Many of the factors on which this policy was based are present herein, including the exercise by all the employees of the same general skills, the use of common facilities, and the similarity of their working conditions. In view of all of the indicia of their mutuality of employment interests, and the fact of the joint employer relationship, we find a unit including employees of Spartan's wholly owned departments and those of licensed departments to be appropriate.⁸

We find that the following employees of the employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and regular part-time employees employed at Spartan's retail department stores located in the metropolitan area of Oklahoma City, Oklahoma, including employees of Spartan's wholly owned and licensed departments, but excluding professional employees, guards, watchmen, confidential employees, management trainees, store managers, assistant store managers, department managers,⁹ head office cashiers, and all other supervisors as defined in the Act.¹⁰

[Text of Direction of Election omitted from publication.]

⁷ *Polk Brothers, Inc.*, 128 NLRB 330, 331.

⁸ In *Frostco Super Save Stores, Inc.*, *supra*, footnote 4, the Board did differentiate as to a single licensed department and allowed a self-determination election by its employees on the separate unit question. However, although the witnesses here were fully competent to testify on, and were examined as to the factors supporting the separate election in *Frostco*, the record here does not suggest that like considerations obtain in the case of any of Spartan's licensed departments. See also *United Stores of America*, *supra*, footnote 4.

⁹ The Petitioner contends that department managers are not supervisors and should be included in the unit, while the Employer takes the contrary position. The record establishes that the department managers direct the work in their respective departments and have authority effectively to recommend the discharge or discipline of employees under their direction. We find that they are supervisors and should be excluded from the appropriate unit.

¹⁰ The parties stipulated to exclude the store managers, assistant store managers, head cashiers, and a management trainee.

Seven-Up Bottling Company, Inc. and International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, and its Local Union No. 150, AFL-CIO, Petitioner. *Case No. 25-RC-2170. January 14, 1963*

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Pursuant to a stipulation for certification upon consent election, an election by secret ballot was conducted by the Acting Regional Director.

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rector on March 27, 1962, among the employees in the unit described below. After the election, the parties were furnished with a tally of ballots which showed that 31 ballots were cast, of which 12 were for, and 12 were against, the Petitioner, and 7 ballots were challenged. The challenged ballots were sufficient in number to affect the results of the election. The Petitioner filed timely objections to conduct affecting the results of the election.

The Acting Regional Director investigated the various issues raised by the challenges and objections and, thereafter, on May 11, 1962, issued and served upon the parties his report on challenged ballots and objections to conduct affecting results of election. In his report the Acting Regional Director recommended that a hearing be conducted to resolve the issues of credibility of whether Herman Frickenschmidt, Myrvin (Ed) Remington, and Robert Rickard are supervisors as defined in the Act. He found that Harold Shaw and Martin Will are eligible voters and recommended that the challenges to their ballots be overruled, and further recommended that the challenges to the ballots of Harriet Robinson and Lynn Miller be sustained. With respect to the objections, the Acting Regional Director recommended that a hearing be held on objections Nos. 1 and 2, and that the remaining objections be overruled. On May 21, 1962, the Employer filed exceptions to the Acting Regional Director's recommendation only with respect to the recommendation regarding the challenge to the ballot of Remington. The Board, having duly considered the matter, found that the Employer's exceptions did not raise material or substantial issues warranting reversal of the Acting Regional Director's recommendation with respect to Remington and, on June 28, 1962, ordered a hearing in accordance with the Regional Director's report.¹

A hearing was held August 10, 1962, in Indianapolis, Indiana, before Clifford L. Hardy, hearing officer. All parties appeared and participated at the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

On August 17, 1962, the hearing officer issued and served upon the parties his report and recommendations. With respect to the challenges, the hearing officer recommended that the challenges of Remington and Rickard be overruled, and that the challenge of Frickenschmidt be sustained. With respect to the objections, the hearing officer recommended that objection No. 1 be overruled and that objection No. 2 be sustained. The Employer filed exceptions only to the recommendation with respect to objection No. 2.²

¹ In the absence of exceptions thereto, the Board heretofore adopted *pro forma* the Regional Director's recommendation that the challenges to the ballots of Robinson and Miller be sustained, that the challenges to the ballots of Shaw and Will be overruled, opened, and counted, and that objections Nos. 3 through 6 be overruled.

² In the absence of exceptions thereto, the Board hereby adopts the hearing officer's recommendations that objection No. 1 be overruled, that the challenges to Remington and

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 McCulloch and Members Rodgers and Fanning].

The Board has reviewed the hearing officer's conduct of the hearing and the rulings made therein, and finds no demonstration of bias or commission of prejudicial error. The Board has considered the challenges and objections, the hearing officer's report, the exceptions and briefs, and the entire record in this case and finds:

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

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that all production and maintenance employees at the Employer's bottling plant located at 651 East 20th Street and 123 West 22d Street, Indianapolis, Indiana, but excluding all office clerical employees, driver salesmen, vendor repairmen, garage mechanics, semitrailer truck drivers, and all professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

5. Objection No. 2 relates to a speech to eligibles made by the Employer on the day before the election (attached hereto as Appendix A). Relying on the principles set forth in *The Trane Company (Clarksville Manufacturing Division)*, 137 NLRB 1506, and *Dal-TeX Optical Company, Inc.*) 137 NLRB 1782, cases in which the Board was concerned with related types of preelection statements, the hearing officer found that the speech in question had a coercive impact upon the employees and thereby interfered with the free choice of the employees. He therefore recommended that the objection be sustained. We do not agree. We have read the speech of the Employer in its entirety and, in our opinion, it differs in tone and content from the preelection speeches on which we relied in *Trane and Dal-TeX*, and is insufficient by itself to warrant setting aside the election. Accordingly, we overrule the Petitioner's objection based thereon. As it appears that the Petitioner did not receive a majority of votes cast, we shall certify the results of the election.

Rickard be overruled, and the challenge to the ballot of Frickenschmidt be sustained. On October 16, 1962, the Board issued an order directing the Regional Director to open and count the above challenged ballots which had been overruled and to issue a revised tally of ballots. In accordance with the Board's order, the Regional Director issued a revised tally which showed as follows: Of approximately 28 valid ballots, 12 were cast for, and 16 were cast against, the Petitioner

[The Board certified that a majority of the valid votes was not cast for International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, and its Local Union No. 150, AFL-CIO, and that said labor organization is not the exclusive representative of the employees in the unit found appropriate.]

MEMBER RODGERS, concurring:
I concur in the result.

APPENDIX A

SPEECH BY EMPLOYER'S ATTORNEY TO ASSEMBLED EMPLOYEES MARCH 26,
1962, BEFORE THE SCHEDULED ELECTION MARCH 27, 1962

Mrs. Joyce reviewed with the employees the working conditions, of fringe benefits, or and fringe benefits which were a part of the overall working conditions at the plant then, and described, or told them that the Company in the past had tried to improve those as business conditions permitted, and that had been the company policy, and that that was the company policy.

And that I think she even said something to the effect that in her opinion that the employees did not need a union. And that was her opinion.

After those remarks she introduced me as the company attorney, and said that she had asked me to come and meet with them to answer any questions which they might have about the election or about anybody's rights.

And at that point, again I identified myself as an attorney who was employed by the Company to advise with them and represent them in labor relations matters.

And initially in my remarks to the employees I said that I wasn't there to convince anybody of anything, or to sell anything, but that the owners of the business had told me that they were convinced themselves that if their employees had all the facts, and had an understanding of the law, or what their rights were, everybody's rights were, that they would have no difficulty in coming to a decision on whatever would be best for them and in their best interest with respect to the issue in the election the next day.

Then I went over, in perhaps a little more detail than what Mrs. Joyce had, the procedures which the Board follows, and anticipated would follow in conducting that election the following morning.

I had in my hand a copy of the official Board notice of the election on which there was printed a sample ballot, and I read it to them, the question they were voting on, and pointed to the YES square and to the NO square, and explained to them that if they wanted the Union to represent them, they would put an X in the YES square, and if not, they would put it inside the NO square.

I explained to them that under a section—I don't even know whether I identified it to them, because I didn't think the number would mean anything—but I explained that under the National Labor Relations Act employees were granted certain rights, and they were protected in exercising those rights. And that among those rights were the right to join a union, to support it, to assist it, to vote for it, to help organize it, to go to its meetings, and also employees were protected in the right to refrain from any of that activity, or to refuse to join it, or support it, or assist it, or vote for it, or attend its meetings. And that they were free to go either way they wanted in exercising their rights, either to support it, get behind it and work for it, or refrain from doing that.

I further explained that they could not be penalized, or they could not be hurt in any way by the employer, insofar as I knew there was no desire or intent on the part of the Employer to penalize or hurt, but they were protected by the National Labor Relations Act, and could not be penalized or hurt for their decision as to which way they went on that issue as to how they exercised their rights under the Act.

I referred to the provisions of 8(a) (3) of the Act, and advised them that they were protected by the Act against any form of discrimination by way of a discharge, or a layoff, or a transfer to a less desirable job, or any other form of discrimination that would be exercised toward them by the Company, or any employer, depending upon how they exercised these rights, and they had no worry of that type that they need give any consideration to in making up their mind.

I further went on and pointed out that whenever this group, or any group of employees that were similarly situated decided today, or any other day, so long as there was no contract provision that restricted this right, that whatever they decided that it was necessary to take part in a strike to obtain something from their employer in the way of a changed working condition, or employee benefits, that they were protected in that, they had an absolute right to, and there was nothing which the employer could do to interfere with that right, or to punish them, or penalize them for exercising it, so long as there was no contract in force prohibiting it, and, of course there was none now, then. And so long as both the purpose of the strike or the picketing, and the method by which it was carried out, were lawful.

And that was a right that employees had, and they could exercise it indefinitely.

That Unions had some rights. And I talked with the employees about the rights of unions to organize employees. . . .

. . . And that unions had rights, too; that unions had rights to organize employees, to solicit their support, and to avail themselves of the facilities of the National Labor Relations Board to try to accord the exclusive rights to represent those employees in collective bargaining.

And when unions were successful, and were supported by employees in that effort, and they have the sole right to represent employees in dealing with their employer. They were the exclusive bargaining agent, and no one could interfere with that right.

And there was a duty, a comparable duty then placed on the employer to recognize the union, to deal with it as the sole and exclusive bargaining representative for the group of employees.

And I went on to point out that the employers were not without rights under the National Labor Relations Act, also, and that one of the rights that the employers had, that was in the nature of a corollary or a counter-right to the employees' right to strike, was that whenever employees felt it was necessary to, and did go out on a strike for the purpose of obtaining either recognition of a labor organization to represent them, or for the purpose of obtaining changes or improvements of any economic sort in their working conditions, whether it was more money, more vacation pay, more insurance, whatever more of anything it might be, that the employer at such time had some rights, and that the employers, every employer at such time was faced with a decision of what it shall do, whether it shall shut its operations down or allow them to be shut down, and remain shut down as long as the strike continues. An employer was faced with obligations at that time, and the obligations that it had to those employees who felt that strike action was necessary was a very real obligation, and it was one that would weigh heavily on any employer.

But that was not the only obligation that an employer was faced with under those circumstances. I said that the employer had other obligations, that it has obligations to those, if any, employees who do not elect to take part in the strike, or the work stoppage, to those employees, if any, who want to work. And its obligations to that group are very real obligations, also. And their obligation to make work available to those employees.

And an employer faced with this problem has other obligations as well. It has obligations to its customers, to that group of people who were perhaps the very reason that jobs existed. And one of the very strong reasons that the jobs existed. And what were those obligations? Those obligations were to continue to meet the requirements of the company products for those customers which had been the company's lifeblood, some of them over many years, to supply what they want, in the quantities they want, and the quality they want. And that that was a very real obligation that the company was faced with when a strike presented itself.

And those weren't all. There were other obligations, wherein under such a situation the company was faced with obligations to those men

and women and children who had put the money, the dollars to provide the real estate we were standing on, the building we were in, the equipment, the materials of which are necessary, obviously necessary to provide the jobs that everyone in the company had. And the obligations to those, that group, are very real obligations.

And there were others as well. And faced with these obligations, the employer, faced with a strike, inevitably has a decision to make, and that is how can it best fulfill these various obligations, and that when any employer, including this employer, is faced with such a strike, if it decided that it could best meet these many obligations, or as many as possible of these obligations which it has, decides that it must operate its plant, or its service, or facility, and even though it would have a preference for operating it with all of its own employees, including those who feel the strike is necessary, but acknowledging their right to strike, and to strike indefinitely, decides to operate using those employees, if any, who want to work, and hiring new employees to the extent necessary to take the place of those employees who feel that the strike is the wise or necessary course of action for them to take, such company does hire new employees to take the place on a permanent basis for those strikers, then, and at that time, and by that action, without any design, without any desire, without any intent on the part of the employer, the employee, or any labor organization involved, as a pure matter of law, just a pure matter of National Labor Relations Act law, automatically upon the hiring of the permanent replacements to take the place of the striking employees, the striking employee loses his right to reinstatement in the employ of the employer, and he loses it for keeps.

That in effect what he has done is to trade places, he who was employed yesterday, trades places with he who was unemployed yesterday, and now has elected to take his job. That that is the legal effect of it.

And that was not to double-talk, it was not in anyway to indicate that there was any lessening or change in the right of the employee to strike, because that's not so. The employee continues protected in his right to strike, whether he's replaced or not. On an economic strike he can strike just as long as he wants to strike. But if he elects to do so, and the employer elects to replace him, and by operational law if he's replaced on a permanent basis, he loses his right to reinstatement, he loses his right to come back to work in his old job.

When my remarks were concluded I asked if any employees had any questions concerning their rights, the Union's rights, the employer's rights, or anyone's obligations, that they would like to talk about, that they would like answered . . .