

rights and privileges previously enjoyed, and further, will make whole Robert E Ball for any loss of pay he may have suffered by reason of the discrimination against him.

STORY OLDSMOBILE, INC.,
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, 501 Book Building, 1249 Washington Boulevard, Detroit 26, Michigan, Telephone No. Woodward 3-9330, if they have any question concerning this notice or compliance with its provisions.

Singer Sewing Machine Company and Retail, Wholesale and Department Store Union, Local 101, AFL-CIO. Case No. 6-CA-2569. February 5, 1963

DECISION AND ORDER

On October 26, 1962, Trial Examiner Frederick U. Reel issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting 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 Leedom, Fanning, and Brown].

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 Intermediate Report and the entire record in the case, including the exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Upon a charge filed August 3, 1962,¹ a complaint issued August 17, and an answer filed August 23, this case (which involves Respondent's attack upon a certification as allegedly controlled by "extent of organization") was heard by Trial Examiner Frederick U. Reel at Pittsburgh, Pennsylvania, on October 4. At the conclusion

¹ All dates herein refer to 1962 unless otherwise specified.

of the hearing General Counsel presented oral argument, and thereafter Respondent filed a brief which has been duly considered. Upon such consideration, and upon the entire record in this proceeding and in the related representation proceeding, Case No. 6-RC-2896, of which I take official notice, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a New Jersey corporation, is engaged in the retail sale and service of sewing machines, maintaining retail shops in several States. During the year preceding the issuance of the complaint, Respondent's gross volume of business exceeded \$500,000 and it purchased and shipped to its Pennsylvania places of business from points outside that State goods, products, and materials valued in excess of \$50,000. Respondent admitted, and I find, that it is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It was stipulated that the Charging Party, herein called the Union, is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICE

A. *The General Counsel's affirmative case*

The record in Case No. 6-RC-2896 establishes that Respondent, for purposes of its retail operations, divided the United States in 32 agencies, one of which, known as the Pittsburgh agency, has its headquarters in Pittsburgh, Pennsylvania, and serves 42 stores in an area running about 260 miles north-south and 95 miles east-west. The Pittsburgh agency is divided into two divisions, and each division has three districts. One of these districts, known as the Pittsburgh city district, comprises eight stores. The Union sought to be certified as bargaining representative of the employees in the Pittsburgh city district, and Respondent took the position that the entire Pittsburgh agency constituted the appropriate unit. After a hearing, the Regional Director issued a Decision and Direction of Election (not published in NLRB volumes) finding, for reasons detailed in footnote 2 of that Decision, that the Pittsburgh city district constituted an appropriate unit. Respondent sought Board review which was denied, and filed a motion for reconsideration which the Board likewise denied. The Union won the election, held June 1, and was certified on June 11. On July 3 and again on August 8, the Union wrote Respondent requesting recognition and bargaining, but on August 10 Respondent, intending to challenge the validity of the certification, refused the request.

B. *Respondent's defense*

The events summarized in the preceding paragraph would ordinarily lead, of course, to a *pro forma* finding that Respondent had refused to bargain. Respondent would then be free to ask the Board to reexamine the validity of the unit finding (which is the sole aspect of the representation proceeding which Respondent attacks), and to obtain judicial review, if the Board finds the certification valid and Respondent wishes to challenge its validity in court. But, in addition to preserving its right to challenge the certification at subsequent stages on the record made in the representation proceeding, Respondent sought to introduce evidence before me which in Respondent's view bore on the validity of the certification. The proffered evidence and my rulings thereon may be summarized as follows.

1. The subpoena directed to the field examiner prior to the hearing

Respondent subpoenaed one John J. Connerton, a field examiner with the Board's Pittsburgh office. A petition to revoke that subpoena was filed before the opening of the hearing. At the opening of the hearing it developed that Respondent had applied in vain to both the Board and the General Counsel for permission for Connerton to testify. Nevertheless Respondent urged me not to revoke the subpoena, relying on *N.L.R.B. v. Capitol Fish Company*, 294 F. 2d 868 (C.A. 5). General Counsel, relying on Section 102.118 of the Board's Rules, pressed the demand for revocation. Upon my inquiry, counsel for Respondent disclosed that he intended to interrogate Connerton concerning certain events which occurred between the closing of the hearing in the representation case on June 27, 1961, and the Regional Director's Decision and Direction of Election, which issued August 25, 1961. More

specifically, Respondent's counsel stated that Connerton would testify that in July 1961 he asked Respondent for the payrolls of three stores, located in suburbs of Pittsburgh but not part of the Pittsburgh city district, and that he wanted these payrolls to check against any "showing of interest" the Union might make in these stores. Respondent's counsel further stated that he would offer, through Connerton, the letter which Connerton wrote requesting the data, and the Company's reply refusing to give it. Finally, Respondent's counsel stated that he hoped to procure, through Connerton, copies of memorandums which passed within the Regional Office on the question of appropriate unit. This testimony and the memorandums according to Respondent's counsel, would buttress his theory that the certification was invalid because the Regional Director in his unit finding acted contrary to Section 9(c)(5) and gave controlling weight to the extent to which the employees have organized. Counsel stated that he had not raised this matter in his request for Board review in the representation case, although in his brief on that occasion he alleged that the Regional Director had relied on extent of organization, and although in that brief he adverted to the geographic proximity of the three stores now in question (and two others) to downtown Pittsburgh.

On the foregoing showing, I granted the motion to revoke the subpoena. I regard *Capitol Fish, supra*, as distinguishable in that it deals with alleged misconduct by a Board field examiner, which—if established—would have reflected adversely on the credibility of all the witnesses against the respondent in that case. Here the testimony of the field examiner was sought for the purpose of shedding light on the factors which motivated the Regional Director in making his unit determination. I believe such an inquiry is precluded by Section 102.118 of the Board's Rules, and also by the line of decisions precluding inquiry into the mental processes of administrative officials in discharging their official quasi-judicial functions. See e.g., *Morgan v. United States*, 304 U.S. 1, 18; *N.L.R.B. v. Donnelly Garment Company*, 330 U.S. 219, 229-230; *Chicago, B. & Q. Ry. v. Babcock*, 204 U.S. 585, 593; *Willapoint Oysters v. Ewing*, 174 F. 2d 676, 696 (C.A. 9), cert. denied, 338 U.S. 860; *Norris & Hirshberg v. S.E.C.*, 163 F. 2d 689, 692 (C.A.D.C.); *N.L.R.B. v. Air Associates, Inc.*, 121 F. 2d 586, 590-591 (C.A. 2); *Bethlehem Steel Company v. N.L.R.B.*, 120 F. 2d 641, 653 (C.A.D.C.), and the cases there cited in footnotes 27, 28. In short, the testimony of the field examiner, even were he not barred under the Board's Rules, would have been immaterial to the issues in the case. I therefore granted the motion to revoke, and suggested to counsel for Respondent that he proceed by way of offer of proof at the appropriate time.

2. The offers of proof

After General Counsel put in his affirmative case establishing the refusal to bargain, counsel for Respondent called the field examiner as Respondent's witness, and upon the ruling that the field examiner need not testify, counsel for Respondent made his offer of proof along the lines indicated above. Specifically, the offer of proof was that Field Examiner Connerton requested the names of the employees in the Carnegie, Mount Lebanon, and McKeesport stores "to check the showing of interest submitted by the [Union]," and that Respondent denied the request. The offer of proof embraced the written request and letter of refusal which are preserved in the record as rejected exhibits. The letter of refusal recites that Respondent does not believe the requested list would serve the purpose for which it was requested—namely, to check the Union's showing of interest—as the Union had not "requested representation rights for the employees of the above-named shops," but had limited its request to the Pittsburgh city district. Respondent's letter of refusal further stated that a list of employees could not be relevant in determining the appropriate unit. Finally, the letter noted that the Union was then attempting to organize the three stores and was advising the employees that the "NLRB undoubtedly would want to include into the unit all shops located in Allegheny County."

Respondent then called as a witness Arthur J. Koller, general agent of its Pittsburgh agency, to testify as to his conversation with Field Examiner Connerton concerning the same matters as to which Respondent desired to call Connerton. I sustained objection to this line of testimony. Respondent thereupon made an offer of proof that Koller would testify that Connerton asked for the names of employees in the three suburban stores, stating as the reason for his request "that these three shops were so close to the city of Pittsburgh that the Regional Director wanted the names to test the interest of the Union in the event that the [three stores] should be included within the unit." Koller was also asked to testify as to the location of the three stores in relation to downtown Pittsburgh as contrasted with the distance from downtown of the other stores in the Pittsburgh unit, but this testimony was excluded

upon Respondent's representation that the matter had been developed in the prior hearing.

Respondent then called as a witness Arnold Metzner, now manager of its Carnegie store but in July 1961 sales representative at the Mount Lebanon store. Respondent attempted to examine Metzner concerning a conversation with Union Business Agent Fedor in July 1961. Upon objection of the General Counsel that such testimony would be immaterial to the issues in the unfair labor practice case, counsel for Respondent stated that he would show that the Union "to accommodate the Board" sought to make a showing of interest in the store. As the matter apparently related to the attempt to show what motivated the Regional Director in his unit determination, I sustained the objection and permitted Respondent to make an offer of proof. Respondent offered to prove that the union agent told Metzner that the Union wanted "to get signed cards from the employees of the [three stores] as the Labor Board was interested in including all shops in Allegheny County in its decision" According to the offer of proof, the union agent told the witness the Union "did not have any of the employees of the [three stores] signed up," and thereafter the witness took authorization cards from the union agent but obtained signatures from only two of the five Mount Lebanon employees.

Finally, Respondent offered to prove through the testimony of Leonard Carnathen, assistant manager of its McKeesport shop, that in July 1961 Union Business Agent Fedor called on Carnathen, showed him the transcript of the representation hearing, "and stated that it was necessary for the Union to sign up employees of the [three stores] since the Board wanted to include all the shops in Allegheny County in the unit." Respondent offered to prove that the business agent said "he had no one in the McKeesport shop signed up," that he gave Carnathen a stack of union cards, and that Carnathen retained them and did not have them signed.

Discussion

Respondent's theory in offering the testimony of the field examiner and of its other three witnesses is that the evidence would establish that the Regional Director's unit determination was controlled by extent of organization. More specifically, Respondent contends that the Regional Director would have included the three suburban stores in the unit because they were all located in the same county with the eight stores in the Pittsburgh city district if the Union had made a sufficient showing of interest in those stores. The Regional Director in his decision explicated the grounds upon which he relied in finding that the stores in the Pittsburgh city district constituted an appropriate unit, and extent of organization was not one of those grounds. In my opinion, his statement of the factors underlying his decision is not open to attack in the manner Respondent sought to attack it—i.e., by testimony of a subordinate Board employee as to his actions or by testimony of Respondent's employees or officials as to what the Board employee or a union official told them. I believe that to permit inquiry along these lines into the Regional Director's mental processes would be contrary to the doctrine set forth in the *Morgan, Donnelly, Babcock*, and other cases cited *supra*, that such inquiry is impermissible. Where the Regional Director (or the Board) has stated that a unit determination rested on certain factors and (either expressly or impliedly) not on extent of organization, an attack on this determination must be bottomed on the insufficiency of support for the factors relied on, or on their inherent insufficiency, or on the inevitability as shown on the record before him that extent of organization was controlling. Such an attack may not be bottomed, I believe, upon evidence of statements or conduct of other persons tending to shed light on the Regional Director's (or the Board's) state of mind.

Assuming, however, that I am in error in the foregoing views it would not alter the result in this case. On this assumption we take as established the facts set forth in the several offers of proof. These "facts" establish that the Regional Director was interested in ascertaining the extent of the Union's showing of interest in the three suburban stores, and that the Union sought hastily and relatively unsuccessfully to organize them, believing that the Regional Director might include them in the unit. But such a showing, if made, would fall far short of establishing that the Regional Director's unit determination was controlled by extent of organization. On the contrary it seems clear that the unit determination was in large part controlled by Respondent's own administrative subdivision, which in creating a Pittsburgh city district excluded these stores and placed them under different district managers.² Moreover, assuming that the excluded testimony was admissible, it

² The hearing in the representation case disclosed that the three stores in question had at one time been included in the Pittsburgh city district but had been removed within the

would be of little weight in determining whether the unit determination was controlled by extent of organization. Certainly statements by a union business agent as to what he thought the Regional Director might decide would not show that the Director was in fact motivated by improper considerations. Similarly, statements by a subordinate employee of the Regional Office would not be binding as to the conduct or motives of the Director, under the settled rule that the Government cannot be bound by the acts of its agents. But even assuming the admissibility of the testimony Respondent proffered, and even assigning it full weight, the utmost that can be claimed for it is that the Regional Director took the factor of extent of organization into account in making his unit determination. Thus, stretched to its utmost, Respondent's evidence would fall short of showing that the Regional Director made that factor "controlling." The unit determination must therefore stand. *Foreman & Clark, Inc. v. N.L.R.B.*, 215 F. 2d 396, 406 (C.A. 9), cert. denied 348 U.S. 887; *Westinghouse Electric Corporation (Elevator Division) v. N.L.R.B.*, 236 F. 2d 939, 943 (C.A. 3); *N.L.R.B. v. Charles M. Smythe, et al.*, 212 F. 2d 664, 667-668 (C.A. 5); *Texas Pipe Line Co. v. N.L.R.B.* 296 F. 2d 208, 212-214 (C.A. 5); *N.L.R.B. v. Salant & Salant, Inc.*, 171 F. 2d 292, 293 (C.A. 6); *Sav-On Drugs, Inc.*, 138 NLRB 1032. But compare *N.L.R.B. v. Glen Raven Knitting Mills, Inc.*, 235 F. 2d 413 (C.A. 4), where possibly because of the history of organization in that case, the court apparently regarded the statute as requiring the Board to establish the inappropriateness of a plantwide unit.

In short, even resolving all questions of admissibility in favor of Respondent and assigning all possible weight to its proffered evidence, Respondent has not overthrown the presumption of regularity to which the Regional Director is entitled in determining whether he disobeyed the statutory mandate. *United States v. Chemical Foundation*, 272 U.S. 1, 14-15; *Smith v. St. Louis & Southwestern Ry.*, 181 U.S. 248, 258; *N.L.R.B. v. Greensboro Coca-Cola Bottling Company*, 180 F. 2d 840, 845 (C.A. 4). Respondent's contention would apparently be the same, if not stronger, had the Regional Director included the three stores in the unit. Indeed, Respondent appears to be of the view that any unit, except that for which it contends, would be improper as controlled by extent of organization.³ On the evidence proffered, and *a fortiori* on the evidence admitted, I find that Respondent has not sustained its attack on the unit determination, and therefore conclude that its conceded refusal to bargain violated Section 8(a)(5) and (1) of the Act.

IV. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I will recommend that it cease and desist therefrom and (adopting the language prescribed by the Supreme Court in *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426, 439) from "in any manner interfering with the efforts of the [Union] to bargain collectively with [Respondent]." See *Farm Bureau Cooperative Association, Inc.*, 135 NLRB 367. I will further recommend that Respondent take certain affirmative action in order to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of the Act.
3. All the employees employed in Respondent's retail shops within the Pittsburgh city district, including assistant store managers but excluding clerical employees of the central agency, guards, professional employees, store managers, district manager, and all other supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining.
4. The Union, since the date of its certification, June 11, 1962, has been and now is the exclusive representative of all employees in the aforesaid appropriate unit for purposes of collective bargaining.

2 years preceding that hearing, one (McKeesport) to the Penn central district and the other two to the Tri-State district.

³ Respondent made a similar contention in Case No. 7-RC-4989 where the Regional Director, overruling Respondent's claim that the entire Detroit agency constituted an appropriate unit, limited the unit to two stores in Flint, Michigan. Respondent unsuccessfully urged in that case that the unit determination was invalid as controlled by extent of organization, and in the resulting election the union polled only 3 votes out of 13. In Case No. 4-RC-4612, Respondent's entire Philadelphia agency was found to be the appropriate unit, but that case contained elements of consent to the unit, not present here.

5. By refusing, on and since August 10, 1962, to bargain collectively with the Union as the representative of the above employees, Respondent has engaged in and is engaging in an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the Respondent, Singer Sewing Machine Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith concerning rates of pay, wages, hours of employment, or other conditions of employment with Retail, Wholesale and Department Store Union, Local 101, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit: All the employees employed in Respondent's retail shops within the Pittsburgh city district, including assistant store managers, but excluding clerical employees of the central agency, guards, professional employees, store managers, district manager, and all other supervisors as defined in the Act.

(b) In any manner interfering with the efforts of the above-named Union to bargain collectively on behalf of the employees in the above-described unit.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all employees in the appropriate unit, and embody in a signed agreement any understanding reached.

(b) Post in each of its retail stores in its Pittsburgh city district, copies of the attached notice marked "Appendix."⁴ Copies of such notice, to be furnished by the Regional Director for the Sixth Region, shall, after being signed by an authorized representative of the Respondent, be posted immediately upon the receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director, in writing, within 20 days from the date of the receipt of this Intermediate Report and Recommended Order, what steps the Respondent has taken to comply herewith.⁵

⁴In the event that this Recommended Order be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "Pursuant to a Decision and Order."

⁵In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with Retail, Wholesale and Department Store Union, Local 101, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any manner interfere with the efforts of Retail, Wholesale and Department Store Union, Local 101, AFL-CIO, to bargain collectively as the exclusive representative of the employees in the bargaining unit described below.

WE WILL, upon request, bargain with Retail, Wholesale and Department Store Union, Local 101, AFL-CIO, as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an

understanding is reached, embody such an understanding in a signed agreement.
The bargaining unit is:

All the employees employed in our retail shops within the Pittsburgh city district, including assistant store managers, but excluding clerical employees of the central agency, guards, professional employees, store managers, district manager, and all other supervisors as defined in the Act.

SINGER SEWING MACHINE COMPANY,
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, 2107 Clark Building, 701-17 Liberty Avenue, Pittsburgh, Pennsylvania, Telephone No. Grant 1-2977, if they have any question concerning this notice or compliance with its provisions.

**A. P. Green Fire Brick Co. and United Brick and Clay Workers
Union of America. Case No. 14-CA-2738. February 5, 1963**

DECISION AND ORDER

On October 18, 1962, Trial Examiner Abraham H. Maller issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Intermediate Report. The Trial Examiner further found that the Respondent had not engaged in other alleged unfair labor practices and recommended that the complaint be dismissed with respect thereto. Thereafter, the Respondent and the Charging Party filed exceptions to the Intermediate Report, together with supporting briefs.

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 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 Intermediate Report, the exceptions thereto, the supporting briefs, and the entire record in this case¹ and hereby adopts the Trial Examiner's findings, conclusions,² and recommendations.³

¹ The Respondent's request for oral argument is hereby denied as, in our opinion, the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² The Trial Examiner concluded, from the fact that Respondent discussed the proposed discharge of employee Docekal with its attorney, that Respondent had knowledge of Docekal's union activities, for absent such knowledge there would have been no reason to consult with its attorney on this matter. In adopting the Intermediate Report and the conclusion that Respondent had knowledge of the discriminatee's union activities, we do not rely upon the Trial Examiner's inference of such knowledge based on the fact that Respondent consulted its attorney on the discharge.

³ The Charging Party excepted to the Trial Examiner's failure to find that Foreman Stubblefield's interrogation of Earl Docekal constituted interference, restraint, or co-