

We reject the first contention. It is now well settled that an employer's operations may affect commerce by reason of its purchases of goods which are brought into the State by its supplier.¹ Here the volume of such purchases is substantial. We find, therefore, that the Employer's operations do affect commerce within the meaning of Section 2(7) of the Act. As to the second contention, the record shows that the Employer's annual purchases of goods originating from places outside the State of Michigan total more than the \$50,000 established as the minimum jurisdictional amount for nonretail enterprises.² However, the Employer's operations are basically retail in nature. We therefore now decide the question left open in the *El Paso*³ and *Chartiers*⁴ country club decisions, and hold that the retail standard is the applicable standard for operations of the nature engaged in by the Employer. As the Employer's gross revenues are less than the \$500,000 required under that standard,⁵ we find that it will not effectuate the policies of the Act to assert jurisdiction herein. Accordingly, we shall dismiss the petition.

[The Board dismissed the petition.]

¹ *N.L.R.B. v. Reliance Fuel Oil Corporation*, 371 U.S. 224

² See *Siemens Mailing Service*, 122 NLRB 81, 85.

³ *El Paso Country Club, Inc.*, 132 NLRB 942

⁴ *Pennsylvania Labor Relations Board (Chartiers Country Club)*, 139 NLRB 741.

⁵ *Carolina Supplies and Cement Co.*, 122 NLRB 88, 89

Davis Cafeteria, Inc., and Polly Davis Broward Cafeteria, Inc. and Hotel & Restaurant Employees & Bartenders Union, Local 339, AFL-CIO. *Case No. 12-CA-2606. November 20, 1963*

DECISION AND ORDER

On August 12, 1963, Trial Examiner Rosanna A. Blake issued her Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices within the meaning of the Act and recommending that they cease and desist therefrom and take certain affirmative action, 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 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 and brief, and the entire record in the case, 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.¹

¹ The Recommended Order is hereby amended by substituting for the first paragraph therein, the following paragraph:

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondents, Davis Cafeteria, Inc., and Polly Davis Broward Cafeteria, Inc., their officers, agents, successors, and assigns, shall:

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon charges filed on March 21 and April 4, 1963, by the Hotel & Restaurant Employees & Bartenders Union, Local 339, AFL-CIO, herein called the Union, the General Counsel, acting through the Regional Director for the Twelfth Region, issued a complaint on April 22, 1963, alleging that the Respondents had violated Section 8(a)(5) and (1) of the Act by refusing to bargain, on request, with the Union which had hitherto been certified by the Regional Director of the Twelfth Region of the Board as the bargaining representative of the Companies' employees. In their answer, Respondents denied having committed any unfair labor practice.

As set forth in detail *infra*, Respondents' basic position throughout has been that they were under no obligation to bargain with the Union because the certification which was issued by the Board in Case No. 12-RC-1603 was invalid and a nullity because: (1) the Board is without jurisdiction over them; (2) the units certified for collective bargaining are inappropriate; and (3) certain conduct (described *infra*) improperly influenced the election conducted by the Board among the employees of Polly Davis Broward Cafeteria, Inc.

A hearing was held before Trial Examiner Rosanna A. Blake on June 17 and 18, 1963, at Miami, Florida. Respondents and the General Counsel were represented by counsel and the issues and the contentions of the parties were set forth on the record. The chief issue raised and discussed was Respondents' contention that they had a legal right to relitigate fully issues raised and decided in the representation proceeding, principally the appropriateness of the bargaining units and the alleged prejudicial effect of certain conduct in connection with the election at one of the Companies. Following my ruling that I would not permit the relitigation of issues previously raised and decided and would not receive evidence known to Respondents prior to the close of the representation hearing, or which could have been known to them with reasonable diligence, Respondents made offers of proof with respect to certain of the issues. The offers of proof (which appear in the transcript of the proceeding) were rejected. Respondents also offered documentary evidence with respect to the same issues. These, too, were rejected and appear as rejected exhibits.

None of the parties presented oral argument but a brief has been received from counsel for Respondents. The latter has been carefully considered by me.¹

Upon the basis of the entire record in the case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS AND THE LABOR ORGANIZATION INVOLVED

In the representation case referred to above (Case No. 12-RC-1603),² the Regional Director for the Twelfth Region in his Decision and Direction of Election (discussed *infra*) found as follows with respect to the Respondents' business activities:

¹ The official report of proceedings in this case contains several errors which require correction in order that the transcript accurately reflect statements made at the hearing.

² *Davis Cafeteria, Inc.*, and *Polly Davis Broward Cafeteria, Inc.*, and *Hotel & Restaurant Employees & Bartenders Union, Local 339, AFL-CIO* (not published in NLRB volumes).

Davis Cafeteria, Inc., and Polly Davis Broward Cafeteria, Inc., are wholly owned subsidiaries of Miami Cafeteria, Inc., with general offices in Miami, Florida, a multi-State operation controlling several cafeterias in and outside Florida. The latter grossed in excess of \$800,000 in the operation of Davis Cafeteria, Inc., and Polly Davis Broward Cafeteria, Inc., during the past year; and during the same period purchased for them over \$138,000 of meats and other food products from local suppliers (who themselves meet the Board's \$50,000 direct inflow standard), 90% of which was received from outside the State of Florida. Employer thus meets the Board's standard for assertion of jurisdiction over retail enterprises. *Carolina Supplies and Cement Co.*, 122 NLRB 88, 89; *International Restaurant Associates, Inc.*, 133 NLRB 1088.

In the circumstances, the Trial Examiner finds that Respondents at all times material herein have been and are now engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it would effectuate the purposes of the Act to assert jurisdiction herein. *Lucas County Farm Bureau Co-operative Association*, 128 NLRB 458, enfd. 289 F. 2d 844 (C.A. 6); *Optical Workers' Union Local 24859, et al. v. N.L.R.B.*, 227 F. 2d 687 (C.A. 5), cert. denied 351 U.S. 963.

Hotel & Restaurant Employees & Bartenders Union, Local 339, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The underlying representation case*

As previously indicated, Davis Cafeteria, Inc., which is located in Hollywood, Broward County, Florida, and Polly Davis Broward Cafeteria, Inc., which is located in Fort Lauderdale, Broward County, Florida, are wholly owned subsidiaries of Miami Cafeteria, Inc. The latter has its principal office in Miami and operates five cafeterias in and around Miami, all in Dade County, which adjoins Broward County.

In late November 1962, the Union filed a representation petition with the Board seeking certification as the collective-bargaining representative of the employees at the Hollywood and Fort Lauderdale cafeterias in a single unit. A hearing was held in Miami on December 11, 1962. The Employers were represented by counsel and were afforded the opportunity to and in fact did call witnesses who testified to the amount and nature of purchases made by each Company from two suppliers (Armour and Company and Swift and Company) and also described the nature and organization of the Companies and the manner in which they are managed and operated.

The Employers contended that the Board was without jurisdiction over them, that the unit sought by the Union was inappropriate for collective bargaining, and asserted that they had a good-faith doubt that the Union represented a majority of the employees. The Employers' position with respect to the unit was that it should include the employees of all seven Polly Davis Cafeterias in the area, i e., the two in Broward County and the five in Dade County, or at least should include the four cafeterias within the parent Company's administrative division, i e., the two sought to be represented by the Union in Broward County plus two in Dade County. The Union stated that it could not "accept" a unit which included any cafeterias located outside Broward County because its jurisdiction is confined to that county.

On December 26, 1962, the Regional Director for the Twelfth Region issued his Decision and Direction of Election in which he found that the Employers are engaged in commerce within the meaning of the Act and that it would effectuate the purposes of the Act to assert jurisdiction. He also established two bargaining units, unit #1 being composed of the employees of the cafeteria at Hollywood and unit #2 being composed of the employees of the cafeteria at Fort Lauderdale. The facts upon which the Regional Director made both his commerce and unit determinations were based upon the undisputed testimony of the Employers' witnesses.

The Employers requested review by the Board of the Regional Director's commerce and unit determinations. The request for review was denied on January 23, 1963, and elections were scheduled for January 26, 1963. The election at Hollywood (unit #1) was scheduled for the morning of January 25, and the one at Fort Lauderdale (unit #2) for the afternoon of the same day. The Union won the morning election by a vote of 28 to 11, and the afternoon election by a vote of 20 to 7.

Prior to the election, a Board representative had advised the parties, *inter alia*, that the ballots cast at the morning election at Hollywood would not be counted until the afternoon election at Fort Lauderdale was concluded. At a meeting the day before the election, the Union requested that the votes at Hollywood be counted and the result announced immediately following the close of the polls. The Employers objected to the change.

Shortly before the polls were opened at Hollywood on the morning of January 25, the Board representative announced that the Hollywood votes would be counted and the result announced as soon as the election was over and this was in fact done.

Thereafter, the Employers filed timely objections to the election which were based in part upon the change in procedure described above, the Companies' contention being that the prompt announcement of the results of the voting at unit #1—Hollywood—materially prejudiced the Employers' rights by tainting the atmosphere surrounding the afternoon voting at unit #2—Fort Lauderdale. They renewed their claim that the units established were inappropriate and asserted, in addition, that: (1) the Board had not duly considered their request for review of the Regional Director's Decision and Direction of Election and that the Board's appeal procedure is arbitrary and capricious; and (2) the Union was actively campaigning among the employees on the morning and afternoon of the election and was making false promises to them during that time.

The Regional Director conducted an investigation of the issues raised by the objections. No hearing was held but the Employers were given an opportunity to present evidence and they submitted the affidavits of nine persons in support of their contention that the announcement of the Hollywood results influenced the results of the later election at Fort Lauderdale.³ At the conclusion of his investigation, the Regional Director issued a Supplemental Decision, Order, and Certification of Representative in which he overruled the objections and certified the Union as the bargaining representative of the employees in both unit #1 (Hollywood) and unit #2 (Fort Lauderdale).

The Employers' request for review of the Regional Director's Supplementary Decision, Order, and Certification of Representative was denied by the Board on April 10, 1963.

B. *The refusal to bargain*

Following the Board's denial of the Employers' request for review of the Regional Director's Supplementary Decision, Order, and Certification of Representative, the Union requested the Companies to bargain with it and they refused on the ground that "negotiations would be premature" until the issues which they had raised in the representation proceeding had been determined by the Board and the courts.

In their answer to the complaint, the Respondents asserted as a defense to the allegation that they had violated the Act by refusing to bargain with the Union basically the same contentions they had made in the representation case, i.e., that the bargaining units were inappropriate, that the announcement of the results of the election in unit #1 (Hollywood) had improperly influenced the results of the election in unit #2 (Fort Lauderdale) and that they had a good-faith doubt of the Union's majority. Their answer also alleged that "new evidence had been discovered which requires a redetermination of the bargaining units." At the hearing they moved for dismissal of the complaint on the grounds that the Board is without jurisdiction over them and that even if it has legal jurisdiction, its assertion of jurisdiction was improper. Their motion was denied.

Respondents did not deny that they had failed to bargain, on request, with the Union and did not adduce any evidence on this issue. On the contrary, their position was that they had a legal and constitutional right to relitigate, *ab initio*, issues raised and passed upon in the representation proceeding, chiefly the appropriateness of the bargaining units and their claim that the announcement of the results of the morning election in unit #1 (Hollywood) improperly influenced the results of the afternoon election in unit #2 (Fort Lauderdale).

In view of Respondents' statement in their answer that "new evidence had been discovered" which required a redetermination of the bargaining units, they were permitted to identify for the record and offer in evidence numerous documents concerning the manner in which the Companies are operated and managed. Many of these, as well as numerous offers of proof, were rejected on the ground that the documents or facts were either known to Respondents during the course of the representation proceeding or could have been discovered by them with reasonable diligence. Also rejected for the same reason, were offers of proof and exhibits concerning the alleged effect on the afternoon election of the announcement of the results of the morning vote.

On the other hand, evidence and exhibits were received concerning the operation of the Companies since the close of the representation proceeding. Nothing therein indicates that there has been any change since that time. On the contrary, both the

³ The Employers presented no evidence in support of its objection based on the Union's alleged electioneering and false promises and it was not mentioned in the instant proceeding.

testimony and the exhibits establish that the businesses continue to be operated as before.

Accordingly, I find that: (1) Respondents tendered no evidence which was not in their possession and/or known to them throughout the representation proceeding or which could not have been discovered with reasonable diligence; (2) Respondents adduced no evidence concerning any change in their operations since the close of the representation proceeding. It follows, therefore, and I find that Respondents presented no evidence which requires or justifies redetermination of the appropriate bargaining units or of any other issue raised and decided in the representation proceeding.

I am therefore bound by the decisions of the Regional Director in the representation case which the Board affirmed by denying the requests for review. As stated by the Supreme Court in *Pittsburgh Plate Glass Company v. N.L.R.B.*, 313 U.S. 146, 162, where the same issues previously litigated in the underlying representation case were similarly sought to be relitigated in the complaint case, "a single trial of the issues was enough." See also *Ideal Laundry and Dry Cleaning Co.*, 140 NLRB 1412.

I accordingly find that Respondents violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, on request, following the Board's denial of Respondents' request for review of the Regional Director's Supplemental Decision, Order, and Certification of Representative.

III. THE REMEDY

Having found that Respondents have refused and still refuse to bargain collectively with the Union in the appropriate units described herein, in violation of Section 8(a)(5) and (1) of the Act, my Recommended Order, among other things, will direct Respondents to cease and desist therefrom and, upon request, to bargain collectively with the Union as the exclusive representative of the employees in the units set forth above.

CONCLUSIONS OF LAW

1. Respondents are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it would effectuate the purposes of the Act to assert jurisdiction herein.
2. Hotel & Restaurant Employees & Bartenders Union, Local 339, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The following units of Respondents' employees are appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Unit #1: All employees employed at Davis Cafeteria, Inc., 1820 Harrison St., Hollywood, Florida, but excluding office clerical employees, guards, and supervisors as defined in the Act.

Unit #2: All employees employed at Polly Davis Broward Cafeteria, Inc., 2321 N. Federal Highway, Fort Lauderdale, Florida, but excluding office clerical employees, guards, and supervisors as defined in the Act.

4. On or after February 28, 1963, and at all times thereafter, the Union was and now is the representative of Respondents' employees in the appropriate units described above for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 26, 1963, and thereafter, to bargain with the Union, on request, as the exclusive representative of the employees in the above-described appropriate units, Respondents have engaged in and are engaging in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings and conclusions and the entire record, including the record in the underlying representation case, I hereby recommend that the Respondents, Davis Cafeteria, Inc., and Polly Davis Broward Cafeteria, Inc., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Refusing to bargain with Hotel & Restaurant Employees & Bartenders Union, Local 339, AFL-CIO, as the exclusive representative of their employees in the units found appropriate concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

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

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

(a) Upon request, bargain collectively with Hotel & Restaurant Employees & Bartenders Union, Local 339, AFL-CIO, as the exclusive bargaining representative of their employees in the units found appropriate, and, if understandings are reached, embody such understandings in a written agreement or written agreements.

(b) Post at their cafeterias at Hollywood and Fort Lauderdale, Florida, copies of the attached notice marked "Appendix."⁴ Copies of said notice, to be furnished by the Regional Director for the Twelfth Region, shall, after being duly signed by Respondents' authorized representative, be posted by Respondents immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted, and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to see that said notices are not altered, defaced, or covered by other material.

(c) Notify said Regional Director, in writing, within 20 days from the receipt of this Intermediate Report, what steps Respondents have taken to comply herewith.⁵

⁴ In the event that this Recommended Order be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "A 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 "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

⁵ In 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 Respondents have taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL, upon request, bargain collectively with Hotel & Restaurant Employees & Bartenders Union, Local 339, AFL-CIO, as the exclusive bargaining representative of our employees in the appropriate units described below concerning rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if understanding is reached, we will enter into a signed agreement or signed agreements of such understanding for a reasonable time. The appropriate units are:

Unit #1: All employees employed at Davis Cafeteria, Inc., 1820 Harrison St., Hollywood, Florida, but excluding office clerical employees, guards, and supervisors as defined in the Act.

Unit #2: All employees employed at Polly Davis Broward Cafeteria, Inc., 2321 N. Federal Highway, Fort Lauderdale, Florida, but excluding office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any manner interfere with the efforts of Hotel & Restaurant Employees & Bartenders Union, Local 339, AFL-CIO, to bargain collectively as the exclusive representative of the employees in the bargaining units described above.

DAVIS CAFETERIA, INC., AND POLLY DAVIS
BROWARD CAFETERIA, INC.,

Employers.

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 No. 223-4623, if they have any question concerning this notice or compliance with its provisions.