

General Teamsters Local No. 324, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America [Curly's Dairy, Inc., and Timber Valley Dairy, Inc.] and Cascade Employers Association, Inc. Case No. 36-CC-96. June 25, 1964

SUPPLEMENTAL DECISION AND AMENDED ORDER

On September 26, 1963, the Board issued a Decision and Order¹ finding that Respondent Union had engaged in consumer picketing at secondary establishments. Relying on *Fruit & Vegetable Packers & Warehousemen, Local 760, etc. (Tree Fruits)*, 132 NLRB 1172, 1177, the Board concluded that Respondent had thereby violated Section 8(b)(4)(ii)(B) of the Act. On April 20, 1964, the Supreme Court rejected the Board's holding in that case. *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58.

Upon reconsideration of this case in light of the Court's aforementioned decision, we find that Respondent Union did not violate the Act as alleged and we shall dismiss the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board² hereby orders that the complaint herein be, and it hereby is, dismissed.

¹ 144 NLRB 836.

² 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 Fanning and Brown].

147 NLRB No. 86.

Sun Drug Co., Inc. and Retail Clerks International Association, Local 298, AFL-CIO. Case No. 6-CA-2925. June 25, 1964

DECISION AND ORDER

On March 31, 1964, Trial Examiner Louis Libbin issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

147 NLRB No. 90.

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 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 Trial Examiner's Decision, the exceptions and the brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner and orders that the Respondent, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon charges filed on January 9 and 22, 1964, by Retail Clerks International Association, Local 298, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for the Sixth Region (Pittsburgh, Pennsylvania), issued his complaint, dated January 29, 1964, against Sun Drug Co., Inc., herein called the Respondent. With respect to the unfair labor practices, the complaint alleges that Respondent refused to bargain collectively with the Union which was the certified exclusive representative of Respondent's employees in an appropriate bargaining unit, and thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, herein called the Act. In its duly filed answer, Respondent admits that it refused to bargain with the Union but challenges the appropriateness of the unit and the validity of the certification.

Pursuant to due notice, a hearing was held before Trial Examiner Louis Libbin at Pittsburgh, Pennsylvania, on February 18, 1964, at which all parties appeared and were represented by counsel. On March 18, 1964, Respondent filed a brief, together with requests for findings of fact and conclusions of law, all of which I have fully considered. Upon the entire record¹ in the case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Respondent, a Pennsylvania corporation with its principal office in Pittsburgh, Pennsylvania, is engaged in the operation of a chain of retail drug stores located in the States of Pennsylvania and West Virginia. During the year preceding the issuance of the complaint, Respondent's gross volume of business was in excess of \$500,000; during the same period, Respondent purchased and received at its operations in the Commonwealth of Pennsylvania, goods and materials, valued in excess of \$50,000, from points directly outside the Commonwealth of Pennsylvania.

Upon the above admitted facts, I find, as Respondent admits in its answer, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

¹ I hereby note and correct the following obvious errors in the typewritten transcript of testimony: On page 8, line 17, the word "by" is changed to "from"; on page 18, line 3, the word "form" is changed to "forum"; and on page 19, line 20, the word "is" is changed to "as".

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find, that Retail Clerks International Association, Local 298, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The sole issues which Respondent seeks to test in this proceeding are the validity of the findings in the representation proceeding (1) as to the appropriateness of the unit and (2) as to the ineligibility of Carol Stilley to vote on the ground that she was an occasional or casual employee.

A. *The representation proceeding*

After a hearing held on June 20, 1963, upon a petition filed by the Union for an election to determine the designation of a collective-bargaining representative, the Acting Regional Director for the Sixth Region, pursuant to his delegated authority under Section 3(b) of the Act, issued a Decision and Direction of Election, dated July 15, 1963, in which he found that all employees of the Respondent's New Castle, Pennsylvania, store, excluding store manager, comanager and fountain manager, guards, professional employees, and other supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within Section 9(b) of the Act.² He also directed that an election be conducted among the employees in the aforesated appropriate unit to determine whether or not they desire to be represented for collective-bargaining purposes by the Union.

Thereafter, on July 23, 1963, the Respondent filed with the Board in Washington, D.C., a petition for review of Regional Director's Decision and Direction of Election. In this petition for review, consisting of 13 printed pages, Respondent contends that the Acting Regional Director erred in finding that a unit confined to the employees of the New Castle, Pennsylvania, store is an appropriate unit within the meaning of Section 9(b) of the Act, and that there were compelling reasons for reconsideration of Board policy. By telegram, dated August 10, 1963, the Board denied Respondent's petition for review "as it raises no substantial issues warranting review and there is no compelling reason in this proceeding for reconsideration of Board policy."

Pursuant to the above-mentioned Decision and Direction of Election, the Regional Director conducted an election on August 13, 1963, among the employees in the aforesated appropriate unit. Of the 12 ballots cast, 6 were for the Union, 5 were against the Union, and 1 ballot was challenged. As the challenged ballot was sufficient to affect the results of the election, the Regional Director, pursuant to the Board's Rules and Regulations, conducted an investigation bearing on the issue of the challenged ballot.

On October 25, 1963, the Regional Director issued a Supplemental Decision and Certification of Representative, consisting of four pages, in which he detailed his findings disclosed by his investigation. In this Supplemental Decision, the Regional Director stated that the Union challenged the ballot of Carol Stilley on the ground that she was a casual employee during the eligibility period and therefore not eligible to vote, and that Respondent considered her to be an eligible voter. He then detailed in two pages the facts pertaining to Stilley's employment relationship and found "that Stilley was an occasional or casual employee, rather than a regular part-time employee, on the eligibility date." Following Board precedents, the Regional Director concluded that Stilley was therefore ineligible to vote and accordingly sustained the challenge to her ballot. He then certified the Union as the collective-bargaining representative of the employees in the appropriate unit.

On November 1, 1963, the Respondent filed with the Board in Washington, D.C., a request for review of Regional Director's Supplemental Decision and Certification of Representative. In this request for review, consisting of 10 printed pages, Respondent set forth its version of the facts with respect to Stilley's employment relationship, and contended that the Regional Director's findings were contrary to said facts, were "arbitrary and capricious," and were "contrary to firmly established Board policy and precedent." The Respondent concluded with a request that the Board set aside the Regional Director's Supplemental Decision and Certification of Representative, and either order the ballot of Stilley to be opened and counted or direct a hearing to determine whether the ballot of Stilley should be opened and counted. By telegram dated December 9, 1963, the Board denied Respondent's request for review "as it raises no substantial issues warranting review."

² In the representation proceeding, the Respondent is designated as the Employer, and the Union is designated as the Petitioner.

B. *The unfair labor practice proceeding*

By letter dated December 17, 1963, the Union requested Respondent for a meeting "at your earliest convenience for the purpose of negotiating a union agreement . . ." In a reply letter, dated December 23, 1963, Respondent's counsel advised the Union that Respondent "declines to meet and bargain with you" because of the belief that the Regional Director erred in finding the single store an appropriate unit and in his disposition of the challenged ballot.

Thereafter, the charge was filed and a complaint was issued in the instant proceeding. At the hearing in the instant proceeding, counsel for Respondent stipulated that Respondent has continued to refuse to bargain with the Union. He stated that he did not intend to adduce any additional evidence with respect to the appropriateness of the unit, being satisfied to rely on the record already made in the representation proceeding. However, he was prepared, and requested an opportunity, to call several witnesses to testify with respect to the employment relationship of Carol Stilley and the issue of whether her ballot should be opened and counted. I sustained the General Counsel's objection to this procedure on the ground that the issue had already been decided by the Board in the representation proceeding and the Board's long-established policy not to permit the same issues to be litigated in the complaint proceeding. Counsel for Respondent then made an offer of proof, which I rejected, that he would prove by named witnesses that Carol Stilley was an employee of the New Castle, Pennsylvania, store during the eligibility period, that she is still an employee of that store, that she was an employee of Respondent before that period, that she was not a casual employee, that she started to work for Respondent about a year before the eligibility period, that her employment with Respondent had never been terminated, and that she had a reasonable expectation and was sure of employment at the New Castle, Pennsylvania, store.

C. *Concluding findings*

Section 102.67 (f) of the Board's Rules and Regulations, Series 8, as amended, provides that "denial of a request for review [of a decision of a regional director] shall constitute an affirmation of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding." And in *The Mountain States Telephone and Telegraph Co.*, 136 NLRB 1612, 1615, the Board pointed out that, in the absence of any evidence unavailable at the time of the representation proceeding or any newly discovered evidence, the Board has in the past refused "to reconsider in a subsequent unfair labor practice proceeding alleging a refusal to bargain matters which have been disposed of in a prior related representation proceeding." The Board also decided in that case that "this policy should also govern where the representation proceeding has been processed under Section 3(b) of the Act and where, as in the present case, the Board has denied a request for review" of the Regional Director's decision. The Board further pointed out in the *Mountain States* case, *supra*, that, in considering a request for review, the Board examines the Regional Director's determinations and his reasons therefore and, "by the denial of such request, has concluded that they were not clearly improper as a matter of law or policy."

Counsel for Respondent however contends in his brief that, as no hearing had ever been held on the issue of whether the ballot of Carol Stilley should be opened and counted, he was attempting to litigate, and not to relitigate, this issue. At no time did counsel for Respondent contend that he had any evidence which was unavailable at the time of his submission to the Board of his request for review of the Regional Director's Supplemental Decision or any newly discovered evidence. An examination of Respondent's request for review discloses that the factual recitation therein does not differ in any significant respect from that set forth in the Regional Director's Supplemental Decision. In any event, counsel for Respondent admitted in the instant hearing, and does not dispute in his brief, that in his request for review of the Regional Director's Supplemental Decision, he explained his position fully to the Board on this issue and set forth his version of the facts. I must assume, as I stated at the instant hearing and as the *Mountain States* case *supra*, indicates, that the Board's denial of the Respondent's request for review in the instant case means that: (1) the Board accepted the truth of the factual recitation in the Respondent's request for review; (2) based thereon, it agreed with the Regional Director's ultimate finding as to the status of Carol Stilley and his disposition of the challenged ballot; and (3) therefore a hearing to permit the Respondent to

adduce evidence in support of the factual recitation contained in its request for review was wholly unnecessary and would serve no useful purpose. As previously noted, the Board's findings and rulings in the representation proceeding are binding upon me. If, as counsel for the Respondent further contends in his brief, the Board was in error in agreeing with the Regional Director's ultimate findings and conclusions, then only the Board or some higher tribunal, and not the Trial Examiner, has the authority to reverse the Board.

Upon consideration of all the foregoing, I find that Respondent's admitted refusal on and after December 23, 1963, to bargain collectively with the Union as the exclusive representative of its employees in the above-described appropriate unit, constitutes a violation of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent 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 practices burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in the unfair labor practices of refusing to bargain collectively with the chosen representative of its employees in an appropriate unit, I will recommend that Respondent cease and desist therefrom and from like and related conduct. I will further recommend that Respondent, upon request, bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Retail Clerks International Association, Local 298, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
2. All employees of the Respondent's New Castle, Pennsylvania, store, excluding store manager, comanager and fountain manager, guards, professional employees and other 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.
3. At all times since October 25, 1963, the Union has been and continues to be the exclusive bargaining representative of all the employees in the aforementioned unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
4. By refusing, on and after December 23, 1963, to bargain collectively with the above-named Union as the exclusive representative of its employees in the aforesaid unit, the Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
5. By refusing to bargain with the above-named Union, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby recommend that the Respondent, Sun Drug Co., Inc., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Refusing to bargain collectively with Retail Clerks International Association, Local 298, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All employees of the Respondent's New Castle, Pennsylvania, store, excluding store manager, comanager and fountain manager, guards, professional employees, and other supervisors as defined in the Act.

(b) In any other manner interfering with the efforts of the aforesaid Union to bargain collectively with Respondent on behalf of the employees in the appropriate unit.

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

(a) Upon request, bargain collectively with Retail Clerks International Association, Local 298, AFL-CIO, as the exclusive representative of the employees in the above-described appropriate unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its New Castle, Pennsylvania, store, copies of the attached notice marked "Appendix."³ Copies of said notice, to be furnished by the Regional Director for the Sixth Region, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof and 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 said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Sixth Region, in writing, within 20 days from the receipt of this Recommended Order, what steps it has taken to comply herewith.⁴

³ 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."

⁴ 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 Respondent has 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 Retail Clerks International Association, Local 298, AFL-CIO, as the exclusive bargaining representative of our employees in the appropriate unit described below, concerning rates of pay, wages, hours of employment, and other conditions of employment and we will embody in a signed agreement any understanding reached. The bargaining unit is:

All employees of our New Castle, Pennsylvania, store, excluding store manager, comanager and fountain manager, guards, professional employees and other supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with the efforts of the above-named union to bargain collectively with us, or refuse to bargain with said union as the representative of our employees in the appropriate unit.

SUN DRUG CO., 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, 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.