

excluding Auto Center salesmen from the unit, we rely on the fact that salesman are separately located, do not interchange with service employees, and, unlike service employees who perform no selling functions,¹⁰ are engaged primarily in selling. As recently articulated by the Board in *Allied Stores of New York, Inc. d/b/a Stern's Paramus*, 150 NLRB 799, and in other cases, there is a separability for unit purposes between selling and nonselling employees in the retail store industry.¹¹ Accordingly, we find that the following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:¹²

All employees employed in the service department of the Auto Center at the Employer's Paramus, New Jersey, store, including tire installers, brakemen, front-end men, stockmen, and seat cover men, but excluding all other employees, office clerical employees, salesmen, guards, and supervisors, as defined by the Act.

[Text of Direction of Election omitted from publication.]

¹⁰ Although service employees may receive commissions or "stims" for suggesting the sale of certain items to customers while servicing their cars, we do not regard this fact as establishing that these service employees are engaged in a selling function.

¹¹ Consistent with his dissenting opinion in the *Allied Stores* case, Member Jenkins would include the Auto Center salesmen in the unit.

¹² See *Montgomery Ward & Co., Incorporated*, *supra*; *J. C. Penney Company Store No. 139*, 151 NLRB 53.

Wenatchee Thrifty Drugs, Inc. and Retail Store Employees Local 631, Retail Clerks International Association, AFL-CIO. *Cases Nos. 19-CA-2687 and 19-CA-2812. March 17, 1965*

DECISION AND ORDER REMANDING
CASE TO THE TRIAL EXAMINER

On September 10, 1964, Trial Examiner Martin S. Bennett issued his Decision in the above-entitled proceeding, recommending that the complaints be dismissed for the reason that the operations of the Respondent do not meet the National Labor Relations Board's standards for the assertion of jurisdiction, as set forth in the attached Trial Examiner's Decision. Thereafter, the Charging Party filed exceptions to the Trial Examiner's Decision and a supporting brief and the Respondent filed a brief in reply to the Charging Party's exceptions.

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

The Board has considered 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 briefs, and the entire record in this case, and finds merit in the Charging Party's exceptions.

The Respondent, Wenatchee Thrifty Drugs, Inc., is a Washington corporation which operates one retail drugstore in Wenatchee, Washington. Its gross volume of sales in 1963 was \$424,000. For the same period, its out-of-State purchases were valued at approximately \$30,000. Clarence Olberg and his wife, Irene Olberg, president and vice president, respectively, own 98 percent of the stock of the Respondent; Ralph Purvis, who is secretary-treasurer, owns the remainder of the stock. These three individuals comprise the corporate board of directors.

Thrifty Investment Co., Inc., d/b/a Thrifty Drugs, hereinafter referred to as Thrifty Investment, operates four retail drugstores, located at Pasco, Kenewick, Richland, and Quincy, Washington. The annual gross sales of Thrifty Investment are in excess of \$500,000. Clarence Olberg, who is president, and Gail Hayes, who is vice president,¹ each owns 50 percent of the stock of Thrifty Investment. Ralph Purvis is secretary-treasurer. These three individuals comprise the corporate board of directors.

Olberg Thrifty Drugs of Bremerton, Inc., d/b/a Thrifty Drugs of Washington, hereinafter referred to as Olberg Thrifty Drugs, is a purchasing and payroll service organization located in Seattle, Washington. Clarence Olberg and Irene Olberg, his wife, president and vice president, respectively, own 98 percent of the stock in this corporation. Willis Rottman is treasurer and Ralph Purvis is secretary. The foregoing individuals, with the exception of Ralph Purvis, comprise the board of directors.

The Wenatchee store is managed on a full-time basis by Gail Hayes, who is paid a salary and a commission. Hayes has sole discretion to hire and discharge employees, set wage rates, and determine vacation periods and holidays. Hayes also prices the merchandise, arranges for advertising, and is given some discretion as to brand of products stocked. Although Clarence Olberg testified that Hayes is responsible for the day-to-day labor relations policies of the Wenatchee store, he admitted that he is advised when a labor relations matter "affects his financial interest" and that he is "drawn into" labor relations "controversies." Thus, in response to one of the complaints issued herein by the Regional Director charging the Respondent with unlawful conduct, the answering letter denying the charges and requesting proper forms "so we can make improper

¹ Hayes, as described below, is manager of Respondent.

conduct charges against the union" was sent on behalf of the Respondent by Clarence Olberg. Each of the store managers at the Pasco, Kenewick, Richland, and Quincy stores operated by Thrifty Investment has the same authority and responsibility as Hayes possesses at the Wenatchee store. However, Hayes, who, as noted, owns 50 percent of the stock in Thrifty Investment, visits its four stores from time to time. His most frequent visits are to the Quincy store, which is the closest to Wenatchee (30 miles distant), these taking place about 10 times a year. There is employee interchange between the Wenatchee and Quincy stores to the extent that pharmacists are interchanged during vacation period, in cases of illness, and at other times, when necessary, to "give some more experience and broaden their viewpoints"; in addition, sales personnel are interchanged between the two stores for purposes of taking inventory.

Olberg Thrifty Drugs collects advertising and purchasing data and handles payroll for the Wenatchee store, for the 4 stores owned by Thrifty Investment, and for about 30 other concerns in the retail drug and food sales business and in similar businesses.² Each store utilizing the service organization pays a designated service fee, which is computed according to the workload of the respective store. Further, a considerable amount of correspondence on behalf of the Respondent, including letters relating to the instant unfair labor practice proceedings, has originated from the office of Olberg Thrifty Drugs. The letterhead used is that of "Thrifty Drug Stores of Washington" and lists, among others, the Wenatchee, Pasco, Kenewick, Richland, and Quincy stores in such a manner as to indicate that they are part of a single chain.

Although the Respondent alone fails to meet the Board's retail standards for assertion of jurisdiction, the Charging Party contends that the Respondent and Thrifty Investment constitutes a single integrated enterprise, and since the operations of these two employers meet the Board's retail standards, the Board should assert jurisdiction. The Trial Examiner, while noting that the question was not "free from doubt," concluded that the General Counsel had not sustained the burden of proof that the Respondent and Thrifty Investment were a single employer, and he accordingly recommended dismissal of the complaint on jurisdictional grounds. We disagree.

In the first place, there is a large degree of common ownership and control of the Respondent and Thrifty Investment. Thus, Clarence and Irene Olberg own 98 percent of the stock of the Respondent and Clarence Olberg owns 50 percent of the stock of Thrifty Investment; Gail Hayes, who is manager of the Respondent, owns 50 percent of

²The Wenatchee store maintains its own payroll bank account and reimburses Olberg Thrifty Drugs for the amount of the payroll. Payroll checks are drawn on the account of Olberg Thrifty Drugs, but the Wenatchee store is designated on the bottom of the check

the stock of Thrifty Investment; Clarence Olberg is president and a member of the board of directors of both corporations, and Irene Olberg is vice president and a member of the board of directors of the Respondent. Also establishing the interdependence of the Respondent and Thrifty Investment is the interchange of employees between the Respondent and the Quincy stores; and the facts that Clarence Olberg exercises a degree of control of labor relations policies of the Respondent, and that the Wenatchee store and the four stores of Thrifty Investment are represented to the public as part of a single chain. We further note that Olberg Thrifty Drugs, which is also largely owned by the Olbergs, performs certain services such as the handling of purchasing and payroll for the Respondent and Thrifty Investment, thus affording the Olbergs an additional measure of control over the latter two corporations.

Under all the foregoing circumstances, we find, contrary to the Trial Examiner, that the Respondent and Thrifty Investment constitute a "single employer" for jurisdictional purposes.³ As the total gross revenue of the Respondent and Thrifty Investment exceeds \$500,000 a year, and as the Respondent made purchases of materials directly from outside the State valued in excess of \$30,000 last year, we find that the Respondent is engaged in commerce and that it will effectuate the purposes of the Act to assert jurisdiction herein. However, as the Trial Examiner, in view of his dismissal of the complaint on jurisdictional grounds, did not reach the substantive issues herein, we shall remand these proceedings to the Trial Examiner for the preparation of a Supplemental Decision concerning the merits of the complaints.

ORDER

IT IS ORDERED that the above-entitled proceedings be, and they hereby are, remanded to the Trial Examiner for the preparation and issuance of a Supplemental Decision setting forth his findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the complaints.

³ See *Overton Markets, et al*, 142 NLRB 615; *Checker Cab Company and its Members*, 141 NLRB 583.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

On August 23, 1963, the General Counsel issued a complaint in Case No 19-CA-2687 against Respondent, Wenatchee Thrifty Drugs, Inc., alleging that Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act. That matter was set for hearing before Trial Examiner Martin S. Bennett at Wenatchee, Washington, on September 10, 1963. At the hearing, and after argument by the parties, I granted a motion by the General Counsel for judgment on the pleadings for failure by Respondent to comply with various provisions of Sections 102.20 and 102.21 of the Rules and Regulations of the Board. The reasons for granting said motion were set forth in a Decision issued by me on October 18, 1963.

On March 25, 1964, the Board issued an Order wherein it vacated the above Decision on the ground that a letter of August 26, 1963, from the president of Respondent to the General Counsel, discussed more fully in the original Decision, constituted a formal answer. The Board also directed a further hearing on the merits.

On March 24, 1964, the General Counsel issued a second complaint against Respondent based upon other charges filed by the Union, Retail Store Employees Local 631, Retail Clerks International Association, AFL-CIO, in Case 19-CA-2812.¹ The second complaint alleged that Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), (4), and (5) of the Act. On April 1, 1964, the Regional Director for Region 19 consolidated the two cases for hearing and the consolidated matter was heard at Wenatchee, Washington, on April 23, 1964. Oral argument at the close of the hearing was waived and a brief has been submitted solely by Respondent.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

Jurisdictional findings ²

Wenatchee Thrifty Drugs, Inc., is a Washington corporation which operates one retail drugstore at Wenatchee, Washington. Its gross volume of sales in 1963 was \$424,000, and 1964 sales have been at a declining rate. During 1963, it purchased materials from outside the State valued at \$30,591.³ It is readily apparent that this retail enterprise, standing alone, does not meet the Board's jurisdictional standards. *Carolina Supplies and Cement Co.*, 122 NLRB 88. However, the General Counsel has specifically alleged that Respondent and another corporation operating drugstores in the State of Washington constitute one integrated employer and he urges that the sales of both corporations should be considered.

This other corporation is a Washington corporation named Thrifty Investment Company, Inc., d/b/a Thrifty Drugs which operates four drugstores located at Pasco, Kenewick, Richland, and Quincy, Washington. The Quincy store, approximately 30 miles distant, is the closest to Wenatchee. The annual gross volume of sales of this company is in excess of \$500,000.

Considering first the corporate structure of Respondent, Clarence Olberg and his wife, Irene, own 98 percent of the stock and one Ralph Purvis owns 2 percent. They are respectively president, vice president, and secretary-treasurer of the corporation and also constitute the board of directors. This store has been managed on a full-time basis for the past 11 or 12 years by Gail Hayes who is paid a salary and commission.

Turning to Thrifty Investment Company, Inc., d/b/a Thrifty Drugs, Olberg is president, the above-mentioned Hayes is vice president, and Ralph Purvis is secretary-treasurer. They are also the board of directors. Olberg owns 50 percent of the stock and Hayes owns the remaining 50 percent. Hayes testified, and it is uncontroverted herein, that he purchased his 50 percent interest in the latter corporation by cash approximately 5 years ago solely as an investment. He further testified that the stock is in no way reimbursement for his services with Respondent, that the only income he receives is from his salary, and that the stock purchase was in no way a bonus arrangement connected with his employment by Respondent.

Although not specifically alleged, the General Counsel relies, however, on still other activities by other corporations. There is evidence, not fully developed herein, concerning many related drugstore enterprises, including a centralized purchasing and payroll preparation service. The precise degree of Olberg's involvement in all of these other operations is not disclosed by this record.

Thrifty Drugs of Washington, which is a trade name for Olberg Thrifty Drugs of Bremerton, Inc., is the purchasing and payroll service organization. It is a service and procurement installation at Seattle which collects advertising and purchasing data and also does payroll services for other concerns. It also owns and operates a warehouse in this building. Its services approximately 37 concerns, including Respondent, which are engaged in retail drug and food sales, as well as other lines of

¹ These charges were filed January 17, February 10, and March 9, 1964. The earlier charges were filed by the Union on August 1 and 8, 1963.

² It is my belief that the evidence bearing upon jurisdiction is dispositive of this matter. Accordingly, I have not set forth herein the evidence concerning the alleged unfair labor practices.

³ Certain other purchases in an undisclosed amount were also made in Portland, Oregon, from the Rexall distributor.

endeavor. Olberg and his wife own 98 percent of the stock of this corporation, and they, together with Ralph Purvis and Willis Rottmann, not otherwise identified herein, are officers.

Respondent maintains a separate payroll bank account in Wenatchee for general accounts payable. Its payroll, however, is made out as a service operation in Seattle by the above-described service organization as is the case with many of the other stores which use this service. Respondent then reimburses Thrifty Drugs of Washington for the amount of the payroll. The statement to the employee which accompanies a paycheck bears the name of Thrifty Drug Stores of Washington at the top, although the respective store involved is duly designated at the bottom. A similar system is utilized with respect to the payroll checks of the four stores owned by Thrifty Investment Company, Inc., d/b/a Thrifty Drugs.

Thrifty Drug Stores of Washington employs a processor who does the purchasing for any store that pays a designated service charge which is computed and divided according to the workload of the respective stores. This service operation also has an accounts payable service department which prepares and remits a separate Wenatchee store check from Seattle. A similar service is performed for the four stores operated by Thrifty Investment Company, Inc., d/b/a Thrifty Drugs.

On the other hand, there is evidence supporting Respondent's contention that these concerns are not one integrated employer. Hayes has sole discretion to hire and fire employees at the Wenatchee store. He alone sets wage rates, determines vacation periods and holidays, and determines his own labor policies. Each manager of the other four stores owned by Thrifty Investment Company, Inc., d/b/a Thrifty Drugs has identical authority as to his own store. There is no evidence of a common labor policy.

Hayes prices all merchandise in the Wenatchee store and arranges for advertising; the same situation exists with respect to the managers of the other four stores. Olberg last visited the Wenatchee store 6 months prior to the instant hearing. As indicated, Respondent handles the Rexall line of merchandise. Only two of the other four stores under discussion herein handle this line.

The record does disclose that Hayes visits these other four stores on occasion. The most frequent visit is to the Quincy store which is the closest. This takes place approximately 10 or 12 times a year. Hayes claimed that this is done solely to look in on his investment. There is no evidence that he participates in any managerial decisions at these stores. He alone makes an allocation for labor costs for the Wenatchee store. It would seem that the respective managers do likewise with respect to the other four stores.

On occasion, the Wenatchee store will loan a pharmacist to the Quincy store. This is done in order to provide personnel "under extreme circumstances," apparently in case of illness or of vacations. There is no other exchange of personnel. In these circumstances, Respondent pays the pharmacist's salary but it is reimbursed by the Quincy store.

There is evidence that on occasion Respondent will exchange merchandise with the Quincy store, consistent with drugstore practice. On the other hand, according to Olberg's uncontroverted testimony, Respondent will pool purchase orders with other Wenatchee drugstores which, it is clear, are entirely unrelated to either corporation under consideration herein.

Conclusions

As I understand the state of the law, potential common control is not sufficient to constitute two corporations one integrated employer under the Act. *J. G. Roy and Sons Company v. N.L.R.B.*, 251 F. 2d 771 (C.A. 1). The Board will look to whether there is centralized control and management, a common labor policy, and common officials and stockholders. *Major Service Co., a Washington corporation*, 129 NLRB 794.

While there are some aspects of this corporate maze which support the position of the General Counsel herein, and the question is not free from doubt, I conclude on this record that the General Counsel has not sustained his burden of proof. More specifically, the use of a common purchasing and fiscal service falls short of the necessary common ownership, management, and operations; centralized control; and common labor policy. See *Worcester Stamped Metal Company*, 146 NLRB 1683, where, although the issue was different, the criteria were similar.

While there is almost identical ownership of Respondent and the service corporation, unlike the case of Respondent and Thrifty Investment Company, Inc., d/b/a Thrifty Drugs, the record does not show the ownership of many of the firms which utilize the service corporation, some of which are in the food field and several in the real estate field. It is therefore equally tenable that this service corporation is in the nature of an independent contractor which performs services for many corporations,

among which are some organizations which it controls. This is not unlike a situation where independent groceries buy from a central co-op which they maintain. While this may amount to common ownership, it is not enough.

The fact that an employer wears two hats by owning or controlling two businesses does not necessarily mean that he is utilizing them simultaneously and proceeding toward one common business objective. I find that the evidence herein does not preponderate in favor of the position of the General Counsel and I shall recommend that the complaint be dismissed. See *Miami Newspaper Printing Pressmen's Local No. 46 (Knight Newspapers, Inc.) v. N.L.R.B.*, 322 F. 2d 405 (C.A.D.C.), and *N.L.R.B. v. Deerfield Screw Machine Products Company, et al.*, 329 F. 2d 558 (C.A. 6).⁴

CONCLUSIONS OF LAW

1. Retail Store Employees Local No. 631, Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Wenatchee Thrifty Drugs, Inc., is an employer within the meaning of Section 2(2) of the Act.

3. It would not effectuate the purposes of the National Labor Relations Act to assert jurisdiction over the operations of Respondent, Wenatchee Thrifty Drugs, Inc.

RECOMMENDED ORDER

In view of the foregoing findings of fact and conclusions of law, it is recommended that the consolidated complaint be dismissed in its entirety.

⁴I expressly do not pass upon one aspect of the jurisdictional problem because it has not been litigated. The second complaint specifically alleged that Respondent and Thrifty Investment Company, Inc., d/b/a Thrifty Drugs, were one employer. I have found that they are not. The employees involved herein were the sales or nonculinary employees. There is a brief reference in the record to the effect that Respondent is a member of a Wenatchee restaurant association which bargains on an associationwide basis with the Culinary Alliance for the culinary employees of members of the Association and is subject to a contract with that labor organization. No other details are disclosed in the record and, in my judgment, Respondent has not been put on notice that it is being charged with coverage on such a theory. Indeed, as noted, the General Counsel expressly litigated another theory.

Local No. 496, United Brotherhood of Carpenters and Joiners of America, AFL-CIO [J. L. Williams & Co., Inc.] and Wood, Wire and Metal Lathers International Union, AFL-CIO. Case No. 13-CD-148. March 17, 1965

DECISION AND DETERMINATION OF DISPUTE

This is a proceeding pursuant to Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Wood, Wire and Metal Lathers International Union, AFL-CIO (herein called Lathers) under Section 8(b)(4)(i) and (ii)(D) of the Act. The charge alleges that Respondent, Local No. 496, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein called Carpenters), induced and encouraged employees to engage in a concerted refusal to perform services for J. L. Williams & Co., Inc., and other employers for the purpose of forcing Orville A. Papineau Specialty Company to reassign certain work to employees represented by Respondent rather than to employees represented by the Lathers. A hearing was held before Hearing Officer Kalvin M. Grove on December 15, 16, and 22, 1964. All parties appeared at the