

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Ideal Laundry and Dry Cleaning Co. and Dry Cleaning and Laundry Workers, Local Union No. 304, Laundry, Dry Cleaning and Dye House Workers International Union. *Case No. 27-CA-1269. June 3, 1965*

SUPPLEMENTAL DECISION AND ORDER

On February 25, 1963, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,¹ finding that the Respondent had unlawfully refused to bargain with the Union as the certified bargaining representative of the Respondent's employees in a unit which the Board had found appropriate. On April 23, 1964, the United States Court of Appeals for the Tenth Circuit vacated the Board's Order and remanded the case to the Board for reconsideration of the unit determination.²

Pursuant to the court's remand, a hearing was held before Trial Examiner Fannie M. Boyls. On January 11, 1965, the Trial Examiner issued her attached Supplemental Decision, concluding that the unit set forth in the original representation proceeding was appropriate, and recommending that the Board reaffirm its bargaining order. Thereafter, the Respondent filed exceptions to the Supplemental Decision and a supporting brief.

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 this case to a three-member panel [Chairman McCulloch and Members Brown and Jenkins].

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.³ The Board has considered the entire

¹ 140 NLRB 1412

² *NLRB v. Ideal Laundry and Dry Cleaning Company*, 330 F. 2d 712.

³ We find, without merit, the Respondent's contention that it was precluded by the Trial Examiner from introducing certain testimony regarding the salaried drivers whose unit placement is in dispute. The Trial Examiner indicated, at the commencement of the reopened hearing, that in her view the court's remand contemplated taking testimony limited to the unit desires of certain employees; immediately after the luncheon recess, however, the Trial Examiner, apparently reversing this ruling, announced a willingness to take any evidence that could possibly be construed as coming within the court's remand. Although the Respondent chose to present some of its evidence as to the issue of the unit placement of the disputed drivers by way of offers of proof, there is no showing that the Trial Examiner prevented the Respondent from presenting relevant testi-

record in this case, including the Trial Examiner's Supplemental Decision and the Respondent's exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions.

In the original representation proceeding,⁴ a production and maintenance unit was found appropriate. In its ruling on request for review in that proceeding,⁵ the Board rejected the contention of the Employer, the Respondent herein, that six salaried drivers should be included in the unit, and refused to accept the evidence it proffered concerning the desires of these employees to be included. In remanding the case to the Board, the court of appeals stated that the desires of employees, while not controlling, "is a factor which the Board should take into consideration in reaching its ultimate decision" as to the unit placement of these employees. At the reopened hearing, all four of the six drivers who were still employed by the Respondent answered in the affirmative when asked whether, at the time of the election in 1961, they desired to be included in the production and maintenance unit and vote in the election.

The Trial Examiner found, upon reconsideration of the entire record, including the Respondent's proffered evidence and the desires of the 4 drivers who testified, that, notwithstanding their present desire to be included in the production and maintenance unit, these drivers more appropriately belonged in a unit with the Respondent's 17 commission drivers. We have also reexamined the record in the light of the evidence adduced at the remand hearing and conclude, as did the Trial Examiner, that the factors for inclusion of the salaried drivers in the unit, including the desires of these employees,⁶ are outweighed by the factors for exclusion discussed at length in the Trial Examiner's Decision and in the Board's Ruling on Request for Review in the earlier representation proceeding. Accordingly, we find, in agreement with the Trial Examiner, that the production and maintenance unit described in the original Decision and Order herein is appropriate, and that the Respondent, by refusing to bargain with the Union as the representative of the employees in that unit, has violated Section 8(a) (5) and (1) of the Act.

mony on these matters. Moreover, the Trial Examiner found, and we agree, that the Respondent's offers of proof were concerned largely with new matters not previously considered by the Board or the court, or with matters which occurred subsequent to the election, and were therefore not within the scope of the court's remand.

⁴ Case No. 27-RC-2082.

⁵ 137 NLRB 1374.

⁶ We have accepted the court's theory with respect to the employees' unit desires as the law of this case, and, as indicated above, have reexamined the record in accordance with the court's remand. For the reasons set forth in the Trial Examiner's Decision, however, we respectfully disagree with the court's opinion to the extent that it indicates that subjective testimony by employees as to their desires for inclusion in or exclusion from an appropriate unit is generally relevant in Board unit determinations.

ORDER

The Board adopts as its Order the Order recommended by the Trial Examiner, and reaffirms its bargaining order of February 25, 1963.

SUPPLEMENTAL DECISION OF TRIAL EXAMINER

STATEMENT OF THE CASE

Pursuant to an order of the National Labor Relations Board dated August 20, 1964, reopening the record and remanding this case to Trial Examiner Fannie M. Boly, for a further hearing in accordance with a decision handed down by the Court of Appeals for the Tenth Circuit on April 23, 1964, in this proceeding, a hearing was held before me at Denver, Colorado, on October 29, 1964. The issue before the court was whether the Board had properly found that Ideal Laundry and Dry Cleaning Co., herein called the Company, had unlawfully refused to bargain with Dry Cleaning and Laundry Workers, Local Union No. 304, Laundry, Dry Cleaning and Dye House Workers International Union, herein called the Union or the Laundry Workers, as the representative of its employees in a production and maintenance plant unit which the Board had found to be appropriate. In the underlying representation proceeding, the Board had permitted 6 salaried drivers to vote under challenge and, in a postelection investigation, had determined that these 6 more appropriately belonged in a unit with the Company's 17 other drivers who were paid on a commission basis, than in the unit of production and maintenance employees, and had sustained the challenges to these 6. The court was of the view that the Board should have taken into consideration the desires of these six drivers in determining the appropriate bargaining unit and remanded the case to the Board with directions that it redetermine the appropriateness of the unit on the basis of certain proffered evidence, "including testimony with respect to the desire of the excluded employees."¹ Only four of the six salaried drivers were still employed by the Company at the time of the hearing on remand and their testimony was received.

At the conclusion of the hearing, the General Counsel argued orally upon the record. Counsel for the Company waived oral argument but thereafter, on December 9, 1964, filed an excellent brief, which I have carefully considered. Upon the entire record in the remand hearing, the entire record in the original complaint hearing—including the proffered evidence referred to by the court in its opinion—and the entire record in the representation proceeding, I make the following findings, conclusions, and recommendations:

I. THE TESTIMONY, MEANING AND APPLICATION OF TERM
"DESIRES OF THE EMPLOYEES"

The Company has consistently taken the position before the Board and the court that "the desires of the employees" which the Board, in certain cases, should consider in determining the appropriateness of the bargaining unit are the desires of employees to be included in or excluded from a particular bargaining unit, and not their desires to be represented or not to be represented in that unit. The testimony which it elicited at the remand hearing was in support of that position.

All four of the six salaried drivers who were still employed by the Company answered in the affirmative when asked by Company counsel whether, at the time of the election in 1961, they desired to be included in the production and maintenance unit and vote in the election—though one of them, Medina, on cross-examination, reluctantly admitted that prior to the election, he had signed a card designating

¹ In view of the fact that the Company had contended in the representation proceeding—and apparently still contends—that all of its 23 drivers, as well as its 13 office employees, should appropriately be included in a unit with its production and maintenance employees, I announced a readiness to receive evidence as to the desires of all these excluded employees, and did receive testimony offered by the Company as to the desires of one of the office employees, Riedl, and one of the commission drivers, Carman, in addition to the testimony of the salaried drivers. At the conclusion of the hearing, however, counsel for the Company agreed with the General Counsel that the court, in its opinion, was referring only to the desires of the six salaried drivers who voted under challenge, and I concurred in this interpretation. Accordingly, I regard as outside, the scope of the remand order and do not consider herein any testimony of Mary Riedl, described in the representation proceeding as one of the 13 office employees, or of Bill Carman, one of the 17 commission drivers.

the Drivers Union² as his bargaining representative and further testified that at that time he was not thinking in terms of whether he would rather be represented in one unit or in another.

Testimony by employees as to their subjective thinking is by its very nature of dubious weight and, in my view, where, as here, the employees purport to testify as to their desires several years in the past, after the issues have been drawn, and in the presence of their employer whose position that they should be in the unit is undoubtedly known to them, their testimony is entitled to even less weight. To determine the unit placement of employees in this manner, it seems to me, is no different in principle than ascertaining the employees' choice of a bargaining representative by putting the employees on the witness stand and having them testify openly, in the presence of their employer, whether or not they want the Union to represent them. Surely it would not be argued that the question whether employees desire union representation should be decided on the basis of this type of evidence, even if the 1947 amendments to the Act (Section 9(c)(1)) did not preclude certifications except pursuant to secret ballot elections.

Insofar as I have been able to ascertain from the authorities cited me by counsel for the Company and from my independent research, the Board has never before in its long history of administering the Act directed the taking of testimony of employees to ascertain their desires for inclusion in or exclusion from any bargaining unit.

In the past the Board, with court approval, has always ascertained the desires of employees regarding their unit placement, in situations where the desires have been deemed relevant, by relying upon such objective type of evidence as union authorization cards or petitions signed prior to the representation hearing, or by elections in which the employees, by voting for or against a particular union, are deemed to have expressed a desire for or against inclusion in the unit which that union was seeking to represent.³ Indeed, in each of the cases cited by the court as supporting its holding that the Board should have taken into consideration the desires of the excluded employees, it was some objective evidence of the desires of employees for or against representation to which the Board and the courts had referred. Thus, in *Pittsburgh Plate Glass Company v. N.L.R.B.*, 313 U.S. 146, 156, the court referred to the "workers' desire to be represented by the Union" [emphasis supplied] as "a fact which has a bearing on the determination of the appropriate unit." It upheld the action of the Board in considering and rejecting a contention that one of the employer's seven plants should be excluded from the multiplant bargaining unit because a large majority of the employees at that plant had designated a union (previously found by the Board to have been company dominated) other than the petitioning union to represent them and had signed a petition asking for separate representation at their plant. (*Pittsburgh Plate Glass Company*, 10 NLRB 111, and 15 NLRB 515.)

²The Drivers Union (Laundry, Linen and Dry Cleaning Drivers Union, Local No 905, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) was seeking to organize and represent the drivers at the same time that the Laundry Workers Union was seeking to organize and represent the production and maintenance employees, but it was apparently unsuccessful in its organizational campaign.

³Signed union authorization or membership cards, or employee petitions designating a particular union as bargaining representative, have sometimes been considered by the Board, especially in early Wagner Act days, as evidence of a desire of those employees to be included in the unit represented by the Union they have joined or designated as their bargaining agent. See, e.g. *Worthington Pump and Machinery Corp.*, 4 NLRB 448, *Armour & Company*, 5 NLRB 535; and *Waterbury Manufacturing Company*, 5 NLRB 288. And, at least since 1937, the Board, in other situations where the desires of employees have been deemed an appropriate factor to consider in unit placement determinations, has been conducting elections to permit employees in certain groups or classifications to determine that issue. In those elections the Board has permitted the groups of employees to vote separately for or against representation by a particular union and has determined their desire as to unit placement on the basis of whether or not a majority of the group voted for representation by the Union. The earliest case in which this type of election was held is *The Globe Machine and Stamping Co.*, 3 NLRB 294, and these self-determination elections are frequently referred to as *Globe* elections. For an analysis of cases dealing with the subject of the wishes of employees in determining unit placement issues, see annual reports of the National Labor Relations Board for the years 1952 (pp. 65-68), 1954 (pp. 41-44), 1958 (pp. 31-32), 1961 (pp. 64-65), and 1962 (pp. 77-78).

In *N.L.R.B. v. Underwood Machinery Company*, 179 F. 2d 118 (C.A. 1), another case cited by the court in support of the proposition that the preference of the employees may be the single factor which would tip the scales in deciding whether to include a group of employees in a particular bargaining unit, the Union had sought to include the employees of the erection and maintenance department in a unit of production and maintenance employees which it sought to represent and the employer had sought to exclude them. The Board, in deciding the unit placement question, permitted the erection and maintenance department employees (group 1) and the other employees (group 2) to vote separately, and ruled that if a majority of the group 1 employees voted for the petitioning union, they would be included in the larger unit with group 2 employees. In this manner the Board equated the desire of group 1 employees for representation by the petitioning union with their desire to be included in the production and maintenance unit and after those employees expressed their "practically unanimous preference" for representation by the union, the Board let this desire tip the scales in favor of finding the larger unit appropriate.

The third case cited by the court was *N.L.R.B. v. Botany Worsted Mills*, 133 F. 2d 876 (C.A. 3). There the Board found a unit of sorting or trapping department employees appropriate in view of evidence that those employees had been organized by the petitioning union and no evidence that a majority of the other employees belonged to any union (*Botany Worsted Mills*, 41 NLRB 218). The court, in rejecting the employer's attack on the Board's unit finding because of the absence of testimony concerning the desires of the employees, pointed out that there was evidence of the employees' desires before the Board, namely, an election in which a majority of the sorters and trappers voted for the union.

On the basis of the cases cited by the court, the authorities cited in footnote 3, *supra*, and all other authorities which have come to my attention, I must conclude that if the desire of the six salaried drivers whose unit placement is in issue is the factor which should tip the scales in a determination of their unit placement, the most reliable way of determining those desires would be by opening and tallying their ballots. Since their ballots were challenged, they have remained separate from the other ballots and may now be counted to ascertain whether a majority of that group expressed a desire for representation by the Union and thereby evinced a desire to be included in the production and maintenance unit which the Union seeks to represent.

II. OTHER FACTORS RELEVANT TO QUESTION WHETHER SIX SALARIED DRIVERS MORE APPROPRIATELY BELONG IN A UNIT WITH THE OTHER 17 DRIVERS OR IN THE PRODUCTION AND MAINTENANCE PLANT UNIT

Prior to the election in 1961, the Company had a total of 23 drivers, 17 of whom were family route men who were paid a commission in addition to a guaranteed minimum salary. The latter are referred to as the commission drivers. The remaining six drivers were paid only a salary. They consisted of four drivers who serviced commercial establishments and two relief drivers who serviced both family routes and commercial establishments.

A consideration of the entire record, including the proffered testimony to which the court has referred and the testimony adduced at the remand hearing, leads me to conclude that regardless of whether a majority of the six salaried drivers voted for representation by the Union, those six more appropriately belong in a unit with the Company's other 17 drivers than in the unit of production and maintenance employees.

Among the factors which, in my view, outweigh in importance the desires of the six drivers is the circumstance that during the preelection period when the Laundry Workers Union was seeking to sign up the production and maintenance laundry and drycleaning employees, the Drivers Union was seeking to sign up the drivers and did, in fact, sign up at least one of the salaried drivers, Medina.⁴ The fact that a union

⁴ At the hearing in the representation proceeding, Union Representative Hogan (who served in the dual role of secretary-treasurer of both the Laundry Workers Union and the Drivers Union) sought to show that the Drivers Union had been attempting to organize the drivers and stated that the Laundry Workers Union was taking the position that the drivers were entitled to their own unit. The Company's then counsel objected to the introduction of evidence regarding the organizational attempts of the Drivers Union and the Hearing Officer sustained the objection. Evidence adduced at the remand hearing or proffered at the first hearing in the complaint case, however, shows that in addition to Medina, drivers Fisher and Erickson were approached by Hogan or Aull

other than the petitioning union was claiming jurisdiction over the drivers and seeking to organize and represent them at the same time that the petitioning union, which renounced jurisdiction over the drivers, was seeking to organize and represent the production and maintenance plant employees is a circumstance which should not be overlooked. Congress has recognized the existence of industrial unrest caused by labor disputes arising out of conflicting claims of different unions for jurisdiction over the same group or class of employees and has sought to encourage the settlement of such conflicting claims by peaceful means. It has proscribed certain types of jurisdictional strikes (Section 8(b)(4)(D)) and set up a procedure by which the Board may determine jurisdictional disputes after the unions have been given an opportunity voluntarily to settle their disputes and have failed (Section 10(k)). Here the Laundry Workers Union and the Drivers Union had avoided conflict by delineating the respective areas which each was seeking to organize and represent. In the circumstances of this case, I believe that the policies of the Act would best be effectuated by giving greater weight to this jurisdictional delineation than to the desires of the six salaried drivers.

Counsel for the Company, pointing to the fact that contracts which the Laundry Workers Union and the Drivers Union have jointly negotiated with Dry Cleaners of Denver, Inc., an association of employers, covered production and maintenance employees as well as all drivers of those employers, and to the fact that the two unions have common officers, apparently contends that in this case the two unions should be treated as the joint representative in a single unit of all those classes of employees. The Board, however, has ruled in this case against the appropriateness of a broad unit which embraces both the production and maintenance employees and all the 23 drivers, and I interpret the court's opinion as approving this part of the Board's decision. In any event, the Company's argument ignores the fact, explained by Secretary-Treasurer Hogan, that each union is affiliated with separate international unions—one with the Laundry Workers International and the other with the Teamsters International—each of which is independent of the other. Hogan testified that the two international unions have an agreement to support each other and that the locals of each international have been cooperating with each other, not only in their organizational drives, but also in attempting to negotiate joint contracts with the association of laundry and drycleaning companies in the Denver area. In that situation both unions sign the contract but the drivers are members of and pay dues to the Drivers Union, while the production and maintenance plant employees are members of and pay dues to the Laundry Workers Union.

These support agreements and acts of cooperation between the unions should not be treated as destroying the identity of the two unions and their traditional presumed competence to represent the particular classes of employees over which they claim jurisdiction. Such cooperation, it seems to me, should be encouraged in the interest of avoiding jurisdictional disputes and enabling the employees' chosen representatives better to deal with the employers in the interest of all concerned. To deny representation to a homogeneous group of employees such as the production and maintenance unit of laundry and drycleaning workers who have selected as their representative a union which does not claim jurisdiction over or seek to represent drivers, or any part of them, merely because the drivers have not chosen to designate as their representative the union which is claiming jurisdiction over them, and seeking to represent them, would, in my view, tend to discourage cooperation by the unions, encourage jurisdictional disputes, and defeat the policies of the Act as expressed in Section 1 thereof.

This is not to say that unions, by mutually setting the boundaries of their respective jurisdictions should *ipso facto* be considered as having thereby established appropriate bargaining units. The Board has expressly refused to permit unions arbitrarily to restrict its union determination authority in this manner.⁵ Nevertheless, the voluntary action of unions in agreeing upon their respective jurisdictional limits is a factor which the Board should consider, especially where, as here, each organization is currently seeking to organize and represent employees within their jurisdictional classifications.

(another union representative serving in the dual role of officer and representative of both the Laundry Workers Union and the Drivers Union) and solicited to join a union. Although the record does not specifically show what union these drivers were being asked to join, it is a fair inference, and I find, that it was the Drivers Union, since the Laundry Workers Union, represented by the same union official, has consistently taken the position that all the drivers constitute a separate homogeneous bargaining unit and the card signed by Medina was for the Drivers Union.

⁵ *Florence Manufacturing Company, Inc.*, 92 NLRB 185, 186, *Mutual Rough Hat Company*, 86 NLRB 440, 443.

The Board, while not speaking in terms of a union's jurisdictional claims, has frequently given consideration to such related matters as the history of bargaining in a given unit, whether any union seeks to include a particular group or class of employees in the basic unit it purports to represent, and whether any other union seeks to represent that group in a separate unit.⁶ The fact that the Laundry Workers Union was not seeking to include the six salaried drivers, or any of the other drivers, in the production and maintenance unit it purported to represent and that the Drivers Union was seeking to represent all the drivers, including the six salaried drivers, in a separate unit should, in my view, have a significant bearing upon the unit placement determination. I do not believe that the interest of the Drivers Union in representing all the drivers should be ignored merely because it was apparently unable to enlist the support of a majority of them, for it was currently available for them if they desired representation.

My conclusion that the 6 salaried drivers here in issue more appropriately belong in a unit with the 17 commission drivers than in the unit with the production and maintenance laundry and drycleaning employees is, moreover, fortified by the circumstance that none of the parties had themselves treated the salaried drivers as different from the commission drivers for unit placement purposes prior to the Board's telegraphic order of July 17, 1961, directing that the salaried drivers be permitted to vote under challenge and that their unit placement be later determined if necessary. In this connection, I note that it was a commission driver, Bill Carman, not a salaried driver, whom the Company had present at the representation hearing for the purpose of having him testify concerning his desires as to unit placement.

III. CONCLUSIONS AND RECOMMENDATION

For all of the foregoing reasons in addition to those heretofore stated by the Regional Director and the Board, I find, as the Board has heretofore found, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All laundry and drycleaning, production and maintenance employees at the Employer's Denver, Colorado, plant, excluding all office clerical employees, drivers, guards, and supervisors as defined in the Act. The employees in that unit having selected the Union as their bargaining representative in the July 19, 1961, election, and the Company having concededly refused to bargain with the Union as such representative, it is recommended that the Board reaffirm its bargaining order of February 25, 1963.

⁶ See, e.g., *The Sheffield Corporation*, 134 NLRB 1101, 1103-1105; *Dewey Portland Cement Company, division of Martin-Marietta Corporation*, 137 NLRB 944, 946, 949; and 142 NLRB 951, enfd. 336 F. 2d 117 (C.A. 10); *E. H. Koester Bakery Co., Inc.*, 136 NLRB 1006, 1011; *Ballentine Packing Company, Inc.*, 132 NLRB 923, 924-925; *The Family Laundry, Inc., et al.*, 121 NLRB 1619; *Gunzenhauser Bakery, Inc.*, 137 NLRB 1613, 1616; *D. V. Display Corp., et al.*, 134 NLRB 568; *The Valley of Virginia Cooperative Milk Producers Association*, 127 NLRB 785.

Orange Belt District Council of Painters No. 48, AFL-CIO (Tri-County Chapter, Painting & Decorating Contractors of America, Inc.) and Ivan Kaufman

Orange Belt District Council of Painters No. 48, AFL-CIO and Ivan Kaufman. *Cases Nos. 21-CB-2212 and 21-CC-679. June 4, 1965*

DECISION AND ORDER

On March 5, 1965, Trial Examiner Wallace E. Royster issued his Decision 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