

**Tom's Supermarket, Inc. and Local 25, Retail Clerks International Association, AFL-CIO.** *Case No. 25-CA-2187. March 30, 1966*

### DECISION AND ORDER

On January 10, 1966, Trial Examiner Benjamin B. Lipton 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 National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. With respect to certain other unfair labor practice allegations, the Trial Examiner recommended that they be dismissed. Thereafter, Counsel for the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed a brief in reply to that of the Respondent.

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

The Board has reviewed the rulings made by the Trial Examiner 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 hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

[The Board adopted the Trial Examiner's Recommended Order.]

### TRIAL EXAMINER'S DECISION

#### STATEMENT OF THE CASE

This proceeding was heard before Trial Examiner Benjamin B. Lipton on September 16 and 17, 1965,<sup>1</sup> in Rensselaer, Indiana, upon a complaint by the General Counsel<sup>2</sup> that Respondent violated Section 8(a)(1) and (5) of the Act. At the hearing, all parties were represented and were afforded full opportunity to present relevant evidence, to argue orally on the record, and to file briefs. General Counsel and Respondent submitted briefs which have been carefully considered.

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

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE COMPANY

Respondent is engaged at Rensselaer, Indiana, in the business of operating a grocery supermarket. During the year preceding issuance of the complaint, Respondent sold and distributed products valued in excess of \$500,000, and received goods

<sup>1</sup> All dates are in 1965 except as otherwise specified.

<sup>2</sup> Issued on May 19, based upon a charge filed by the Union on April 5 and served upon Respondent on April 6.

directly in interstate commerce valued in excess of \$50,000. Respondent admits, and I find, that it is engaged in commerce within the meaning of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

Local 25, Retail Clerks International Association, AFL-CIO, herein called the Union, is a labor organization within the meaning of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. *The issues*

Concerning the 8(a)(5) allegation, the General Counsel relies upon alternative theories: (1) Respondent refused to recognize and bargain with the Union, upon request, notwithstanding that Respondent was aware that the Union, having signed authorization cards, was the majority representative in an appropriate unit of employees;<sup>3</sup> and (2) by engaging in unlawful conduct to undermine the Union and destroy its majority status, Respondent demonstrated that its refusal to recognize and bargain with the Union was lacking in good faith.<sup>4</sup> Independently, a series of violations of Section 8(a)(1) are alleged, including coercive interrogation of employees, and threats of discharge, store closure, and changes in hours, wages, and working conditions if the Union were selected as bargaining representative. Respondent denies that it committed any of the alleged unfair labor practices.

### B. *Organizing campaign; bargaining requests and refusals*

On March 20, an initial meeting was held at the home of Mary E. Williams attended by 17 or 18 employees of Respondent and John E. Case, secretary-treasurer of the Union. Cards were distributed authorizing the Union to act as bargaining representative for the signatory employees. Among other things, Case told the employees that if the Union received signed cards from 51 percent of the employees, it would immediately notify Respondent and request recognition.

At the meeting, 11 authorization cards were signed and returned to Case.<sup>5</sup> He also received at the meeting or shortly thereafter six additional cards which had been previously executed.<sup>6</sup> Still later, five more signed cards, all dated March 23, were obtained by the Union.<sup>7</sup>

By letter dated March 22, the Union notified Respondent that it represented a majority of the employees, demanded recognition, and requested a meeting. It specified the unit as covering—"all grocery, produce and meat department full-time and part-time employees, [e]xcluding one Store Manager, one Assistant Store Manager, Guards and Supervisors as defined in the Act, as amended." On March 24, Case telephoned Respondent's president, Thomas H. Clark, and arrangements were made for a meeting.

On March 26, Case and Loyce Sanford for the Union met with Clark and Respondent's attorney, Thomas B. Dumas, at the latter's office. Case testified that "Dumas asked what proof the Union had to support its majority claim, and he was told 'signed card.'" He asked if he could see the cards, and the union agents gave him 17 cards.<sup>8</sup> Dumas and Clark examined and counted the cards. The Union expressed its claim on the basis of 27 employees in the unit, while Clark indicated there were 30 employees. Case testified that Dumas asked Clark "if this was the majority of

<sup>3</sup> Citing *Fred Snow, et al., d/b/a Snow & Sons*, 134 NLRB 709.

<sup>4</sup> Citing *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F. 2d 732 (C.A.D.C.).

<sup>5</sup> James F. Miller, Charles S. Reed, Anna E. Hood, Judy Lane, Delmar Curtis, Phil Dick, Phil A. Berg, Mary E. Williams, Donna Torbet (Moore), Shela B. Murphy, and Russell Sullivan. The card from Sullivan is undated, and the remainder are dated March 20.

<sup>6</sup> From Judy Rosenkranz, Case received her own card (dated March 16), and those of Phyllis Kuyrkendall (card dated March 15); Don Tweedie (card dated March 18); Lois Cady (card dated March 18); Robert Burman (card dated March 18); and Bonnie J. Battleday (card dated March 18). Tweedie, Burman, and Battleday were present at the March 20 union meeting.

<sup>7</sup> At an unspecified date, Case received from James Miller the cards of Wayne Steffen, John R. Michael, Dick Hamer, and Virgil Daniels. Judith Anne Millikan authenticated her own card but it was not disclosed to whom she gave it.

<sup>8</sup> As identified, these were all the cards dated on or before March 20, and Sullivan's undated card.

this people; and he said 'yes.'"<sup>9</sup> The Union requested that Respondent sign a recognition agreement and Dumas refused. Dumas stated that he was not a labor lawyer and would recommend that Respondent retain such counsel. A discussion ensued, in which the Union participated, concerning the names of labor attorneys, upon which note the meeting concluded. Earlier, Sanford requested that Clark stop having meetings with the employees, and Dumas commented upon Respondent having rights in the matter.

By letter dated March 27, Respondent informed the Union that, after further consideration, it believed recognition of the Union should be based on the results of an election conducted by the Board.

On April 1, a second meeting was held in Dumas' office, attended by Case, Sanford, Clark, Dumas, and Palmer C. Singleton, Jr., Respondent's counsel herein. Singleton referred to the Union's specification of 27 employees in the unit and stated that Respondent's payroll contained 31 employees. He inquired whether the Union sought the four employees in the meat department, and received an affirmative response.<sup>10</sup> He mentioned that Clark received expressions from certain employees of "a change of heart."<sup>11</sup> Singleton said that Respondent had a good-faith doubt of the Union's majority, desired a Board election, and was ready to enter into a stipulated or consent election.

On April 2, Clark, in the company of Store Manager Weiss, separately interviewed in the privacy of the produce room 30 individuals currently employed.<sup>12</sup> For each such person, a written interview sheet had been prepared for Clark by Attorney Singleton, as follows:

RE: INTERVIEWS OF EMPLOYEES TO DETERMINE MAJORITY  
STATUS OF THE UNION

1. Employee should be interviewed by Tom Clark and his manager; the interview should take place in the storeroom or other facility within the store except it should not be conducted in the manager's office.

2. The interview should be conducted on company time and employees should be paid for the time spent in the interview.

3. The questions asked of employees should be those questions listed hereon, and only the questions listed hereon.

4. A record of each employee's interview should be maintained.

5. Each employee should be advised as follows:

(a) I want to determine how many authorization cards have been signed by employees.

(b) Your job is not in danger. You may speak freely. If you desire you are free to go at anytime.

(c) I am not inquiring into how you feel for or against the Union and you are under no obligation to discuss the Union.

6. The questions to be asked are these:

A. Did you sign an authorization card wherein you requested that Local No. 25—AFL-CIO of the Retail Clerks Union was to represent you as the bargaining agent of Tom's Super Market?

B. Did you voluntarily sign this card?

<sup>9</sup> Dumas denied that there was any conversation in which Clark said "that this Union had a majority of the employees." Clark was not questioned on the point.

<sup>10</sup> While Clark initially testified that there was strong disagreement on the unit, he conceded on cross-examination that the only difference was whether there were 27 or 31 employees. Although repeatedly questioned on the point, Clark failed to indicate that, in any of the conversations with the Union, Respondent took the position that the requested unit was inappropriate.

<sup>11</sup> Clark testified that, on March 30, Battleday voluntarily told him she had signed a card and that she did not know why she did, or "some such thing." Battleday testified for the General Counsel, *inter alia*, that she knew the purpose of the card was to "have a union at Tom's." She was not questioned by Respondent concerning a March 30 conversation with Clark. Clark stated that there were "lots of other conversations" with employees, but specified no other instances which would show "a change of heart."

<sup>12</sup> As stipulated, Respondent's payroll for the week ending March 24 contained 31 names, excluding Store Manager Weiss. Of these, all were interviewed on April 2, with the exception of David Shaw. Respondent contends Shaw was then on a leave of absence, an issue discussed *infra*.

The testimony reveals that the interviews were conducted substantially in accordance with the specified format. The following results were obtained:<sup>13</sup>

In response to question "A," 21 answered "yes," and 8 answered "no." One employee, Anna Hood,<sup>14</sup> inquired whether she had to answer. Clark again read from the script that her job was not in danger and she was free to go at any time. She asked, "Does that mean I am fired?" Clark said it meant she was free to leave the room. Thereupon she left.

Those employees who answered "yes" were asked question "B"—whether they had signed the card voluntarily. All but five again answered "yes" to this question. According to Clark's notes, more elaborate replies were given by the five employees, viz:

CHARLES REED—Yes, I guess so. I figured when voting comes up my vote would change.

RUSSELL SULLIVAN—Yes. On second thought I would not have done it again. I feel that this should have been discussed with Tom.

ANNE MILLIKAN—I signed a card March 23, 1965, with the intention of helping to promote negotiations or discussions. I did not attend the meeting. However due to the fact that my family is moving I will be quitting in the near future. If I were staying I would definitely give my vote more consideration and thought. I feel that to the above fact that I am moving to Bloomington, I feel that the person who takes my place should have a say or decision about this.

BONNIE BATTLEDAY—Yes I did but I regret it now. It was in such a rush I did not have time to think.

JOHN MICHAEL—Yes. At the time it was voluntary but it was premature because I didn't know what the implications were at the time. More than half the reasons I signed the card was to conform to the rest of the employees action.

Respondent contends that these five employees<sup>15</sup> indicated that they had changed their minds in support of the Union. The form of the interview and the questions posed were confined and controlled by Respondent. In the circumstances, Respondent had the burden of establishing with clarity the employee responses on which it intended to rely. Generally it is noted that the comments of these employees were not responsive to the question—whether they had signed voluntarily. Sullivan is found, *infra*, to be a supervisor and further need not be considered. Reed's remarks are ambiguous. No election was pending. Clark testified that "to the best of his knowledge" Reed said his vote "would change," but conceded that Reed might have said that his vote "could change." Battleday's comment that she "regret[s] it now," while somewhat cryptic, does impliedly show a change of attitude. However, regarding Millikan and Michael, there is simply no reasonable basis for Respondent to infer that these employees reversed their indicated designation of the Union. As to Hood, in no sense could Respondent count her as among those opposed to the Union. It is apparent that she chose not to answer Clark's interrogation because of her own feeling of restraint and fear of reprisal. Viewed realistically, Hood's reaction to the interrogation could only convey to Respondent the conclusion that she was one of the card signers and that she would not disavow it.

It can scarcely be doubted that Respondent was made directly aware from the results of the interviews that the Union was authorized by a majority of the unit employees to act as representative. Even assuming, as I do not, that Reed and Hood are to be excluded, there were clearly 17 employees who expressly reaffirmed their designation of the Union. The Union's majority is evident, whether the appropriate unit consisted of 31 employees as contended by Respondent, or 28 employees as contended by the General Counsel and as found *infra*.<sup>16</sup>

Subsequent to April 2, William H. Wynn, an official of the Union's district council, called and spoke by telephone with Clark. Wynn testified in substance as follows: Clark agreed that Respondent recently met with the Union; that a recognition request was made; that Respondent asked to see proof of the Union's majority; that author-

<sup>13</sup> On the bases of Clark's testimony; a written report submitted by Respondent to the Board's Regional Office prior to the hearing; and the handwritten answers appearing on the interview sheets, stipulated as accurately reflecting the notes taken by Clark at the time.

<sup>14</sup> She had signed an authorization card on March 20.

<sup>15</sup> Millikan gave testimony substantiating Clark's notes at the interview. The others were not called or questioned on the subject.

<sup>16</sup> The sole unit dispute involves Russell Sullivan and Cora George, who are held to be supervisors, and David Shaw, who is excluded as a casual employee.

ization cards were shown; and that Clark "checked" the cards and said "it was a majority of his people." Wynn told Clark he understood that Respondent "interrogated the people since that time and that they had also told you that they signed the cards"—which Clark admitted. Wynn then asked how Respondent could have a good-faith doubt that the Union represented the majority of the employees, and Clark could not answer. Wynn stated that unless Respondent recognized the Union, charges would be filed with the Board.<sup>17</sup>

As of April 5, Respondent filed an election petition with the Board; as earlier noted, the Union's charges were filed on the same date.<sup>18</sup>

### C. *The appropriate unit*

The complaint alleges, and Respondent admits, that a unit appropriate for collective bargaining consists of:

All full-time and part-time grocery, produce and meat department employees at the Rensselaer, Indiana, store, excluding the store manager, assistant manager, and all guards, professional employees, and supervisors as defined in the Act.

Russell Sullivan is the head of the meat department. Only he and Store Manager Weiss receive, in addition to salary, a bonus based on a percentage of sales.<sup>19</sup> Clark "would never think of hiring anybody [for the meat department] without consulting him"; normally wants Sullivan to have final say on hiring; and wants the employees "to have that feeling" that they were hired by Sullivan and that they are working for him. Among other things, Sullivan independently schedules the work of the employees in the department. It is sufficient on these facts that Sullivan is represented to the employees to be, and does exercise authority as, a supervisor under the Act. He is therefore excluded from the unit.

Cora George is the head cashier or checker. Her main working functions are to balance the cash registers and to count receipts. She schedules the hours of the five female cashiers, assigns overtime work, reassigns particular check-out stands, and grants time off. Store Manager Weiss does not hire the cashiers and exercises "not much" control over them. Clark himself assumes that responsibility; but the head cashier is his "contact with the girls," and he lets George take as much authority as she can absorb. In all the departments, including the cashiers, Clark "likes" to have the approval of the department head in the hiring of a new employee. George initially interviews applicants for a job as cashier, is consulted for a hiring recommendation and for an opinion as to what the applicant is worth in salary. Clark makes the final decision. On the evidence in this case, particularly of the manner in which Clark operates this store, I find that Cora George, like Russell Sullivan, is held out to the employees as a management representative and is vested with certain of the supervisory powers defined in the Act. Accordingly, she is excluded from the unit.

David Shaw was a student in Rensselaer. In September 1964, he worked 17 hours in 1 week as a stockboy at Respondent's store. He next worked a total of 47 hours in a 2-week period ending March 27, and again about 4 hours in May. These 68 hours constituted the sum total of his employment. About April 1 or 7 (after the Union's bargaining request), Clark learned from Shaw that he was now a student at an art school in Chicago. Clark testified that Shaw asked him what will "this Union thing" do for him and whether he will be able to come back. Clark suggested that, if Shaw so desired, a notation could be made on the payroll that Shaw requested a leave of absence. Shaw's response was not indicated, but thereafter he was noted as being on a leave of absence. Clark indicated that "apparently it didn't work out for him to come back to us." There was no agreement for Shaw to return to work at any specific time. No reasonable basis appears to justify a leave-of-

<sup>17</sup> Clark testified that the conversation, which lasted about a minute, took place on March 30, and that the "tenor" of his answer to Wynn was that he had retained counsel and a meeting was scheduled within a day or two. He denied any agreement on his part that the Union represented the majority. He did not specifically deny or mention the reference by Wynn to the employee interviews on April 2. While the conflict is not critical, I credit Wynn, and place the telephone conversation sometime between April 2 and 5.

<sup>18</sup> The Union and Respondent had two additional meetings, at the end of April and early May, apparently resulting in no change of position.

<sup>19</sup> Sullivan requests payment of the bonus about every 4 to 6 weeks; his last bonus check amounted to \$500.

absence status in the sense of establishing or preserving a sufficiency of interest by Shaw for inclusion in the unit. From Shaw's work history it is evident that the nature of his employment was sporadic and occasional, and not that of a regular part-time employee. He is therefore excluded.

#### D. *The Union's majority status*

As of March 20, the Union had 15 valid authorization cards, excluding that of Russell Sullivan, a supervisor, and of Don Tweedie, whose signature on the card was not authenticated by any witness. When offered, Tweedie's card was rejected, subject to reconsideration. Subsequent motion by the General Counsel for admission of the card in evidence is hereby granted. Tweedie was present at the March 20 union meeting when his signed card, with others, was delivered by Rosenkranz to Union Agent Case. At the interview on April 2, Tweedie told Clark he had voluntarily signed a card. In addition, Tweedie's signature, as authenticated, was affixed to a "petition" signed by 17 employees sometime in April indicating their desire for immediate negotiations and not for a representation election.<sup>20</sup> On his authorization card and on the "petition," I find Tweedie's signature is identical.

At the March 26 meeting, these 16 valid cards from the Union were taken and examined by Respondent. Additionally, the Union obtained five valid cards dated March 23. Thus, it had a total of 21 cards of 28 employees in the unit, a clear majority.<sup>21</sup>

Respondent has attempted to raise issues concerning the propriety of the unit requested by the Union. In its initial demand letter of March 22, the Union plainly defined the same unit which is found herein to be appropriate. At no time was the Union advised, directly or indirectly, that Respondent refused to bargain because the unit requested was inappropriate. Yet Respondent in its brief "insists" that until after the second meeting, on April 1, "there was a doubt as to the unit sought by the Union." I find the position devoid of any merit. Even if there were a variance between the proposed unit and the appropriate unit, as argued by Respondent, it would only be minor and subject to modification by the parties.<sup>22</sup> It would not affect the Union's majority status, and not excuse Respondent from its statutory obligation to bargain.

#### E. *Conclusion on refusal to bargain*

At the March 26 meeting, Respondent declined the Union's recognition request. It did not question the genuineness of the cards, nor seek any further opportunity in which to examine the signatures, nor express doubt of the Union's majority. However, the meeting ended on a tacit understanding that nothing further would be done by Respondent until it retained a labor attorney.

At the April 1 meeting, Respondent insisted upon a Board election as a condition to recognition. Then Respondent undertook the April 2 interviews. Respondent now states that the results thereof established the basis for its good-faith doubt of the Union's majority status. The converse is plainly the case, as already appears. The Union's bargaining requests were continuing, and were in fact repeated after April 2 and rejected by Respondent. Having itself invoked and controlled the procedure for systematically interrogating the employees on April 2, Respondent is confronted with unambiguous results of a majority designation of the Union which it cannot successfully avoid.<sup>23</sup> It is therefore found and concluded that, on and after April 2, Respondent was fully aware that the Union represented the majority of employees in the appropriate unit, and that in the absence of good faith it refused to bargain with the Union, in violation of Section 8(a)(5) of the Act.

<sup>20</sup> It appears that the petition, as such, was never shown to Respondent. However, Rosenkranz testified that Clark showed her a newspaper clipping which referred to the petition.

<sup>21</sup> It is not disclosed whether at the March 26 meeting the Union also had the cards dated March 23 but failed to show them to Respondent. The point is not material. I find no merit in Respondent's vague contentions that only yellow authorization cards were displayed to Respondent by the Union, whereas the cards on which the Union relies consist of both yellow and white.

<sup>22</sup> *Mrs. Homer E. Ash, et al., d/b/a Ash Market and Gasoline*, 130 NLRB 641, 642; *The Hamilton Plastic Molding Company*, 135 NLRB 371, 373.

<sup>23</sup> E.g., *Snow & Sons*, 134 NLRB 709, enfd. 308 F. 2d 687 (C.A. 9); *Greyhound Terminal*, 137 NLRB 87; *Bihnski Sausage Manufacturing Company, Inc.*, 132 NLRB 229.

F. *Restraint and coercion*

The complaint contains various allegations of coercive conduct practiced by Respondent upon employees before and after the April 2 interviews. On these issues, the testimony of the General Counsel's witnesses is substantially undenied and uncontradicted by Respondent.

1. On March 30, Clark discussed the subject of the Union with seven or eight stockboys assembled in the stockroom at the back of the store.<sup>24</sup> Clark had with him two of the Union's contracts covering "grocery stores,"<sup>25</sup> and he referred to these instruments in replying to various questions of employees as to how representation by the Union would affect their working conditions. Respondent's policy was to accommodate students who participate in extracurricular activities at the school, such as football and other sports, by allowing them special working hours. Clark said that the contracts would not permit such scheduling of hours for football players, and that the use of the "split shift" was specifically forbidden. As Clark testified, he told the employees that both contracts required a schedule to be posted on Friday for the following week, and in effect that he would not be able to give them time off for practice in a sport, to play in a game, to do homework, or to have a "date." He also indicated that their hours would be cut, particularly on their long days, Friday and Saturdays, because the Union contract required overtime pay at time and a half for work in excess of 8 hours. He thought their work would be "stepped up." Concerning wages, Clark answered that he did not know or was not sure.

Clark's advice to the employees clearly carried the message that they would seriously suffer detrimental changes in working conditions under a contract with the Union. It is no defense that his statements were promoted by questions from the employees, particularly as he had expressly encouraged the employees to discuss with him matters relating to card signing and union activity. Regardless of motive, Clark acted at his peril by engaging in such discussions. As I find, however, his conversations with the employees on March 30 were calculated to discourage their adherence to the Union. The two contracts he had obtained<sup>26</sup> furnished no valid basis for his representations to the employees. Indeed, Clark testified that he had previously asked the Union what it wanted in the way of a contract and was told he was premature. Moreover, he had inquired and was specifically advised by the Union that Respondent was not expected to sign a contract "as expensive or glorious" as that in effect at the "A & P" store in Rensselaer.<sup>27</sup> The particular contract conditions to which Clark adverted in his conversations with the employees on March 30 were matters subject to collective bargaining and to a substantial degree within Respondent's control. I find that Clark's conduct at such time was intended to, and did, have a coercive effect on the employees in the exercise of their self-organizational rights, and that Respondent thereby violated Section 8(a)(1) of the Act.

2. Respondent had no immunized right to engage in the interrogation and polling of employees on April 2 because it purportedly sought to verify the Union's majority claim. Respondent had only recently engaged in unfair labor practices of a coercive nature and, as indicated *infra*, it continued to commit such violations in the immediately ensuing period. Nor can Respondent's stated purpose of interrogating the employees be regarded as intended in good faith, as it gave no effect whatsoever to the clear results of poll showing that the majority of employees desired representation by the Union. In light of all the circumstances it is found that such conduct by Respondent reasonably tended to restrain and interfere with the employees in the exercise of their guaranteed rights in Section 7.<sup>28</sup>

<sup>24</sup> James Miller testified that one of the boys had asked Clark a question, and before answering, Clark told Miller to bring all the boys in the back room, with the remark that, "Maybe we can get things straightened out a little this way."

<sup>25</sup> He had obtained from Attorney Singleton one contract, otherwise unidentified, and the other contract was matted to him by a friend involving a store in a different city.

<sup>26</sup> They were not offered in evidence by Respondent or further described beyond the general testimony, *supra*.

<sup>27</sup> Clark attempted, unsuccessfully, to secure from the Union a copy of the "A & P" contract.

<sup>28</sup> E.g., *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F. 2d 732 (C.A.D.C.), cert. denied 341 U.S. 914; *N.L.R.B. v. Camco, Inc.* 340 F. 2d 803 (C.A. 5); *N.L.R.B. v. The Lorben Corp.*, 345 F. 2d 346 (C.A. 2); *International Union of Operating Engineers, Local 49, AFL-CIO (Strukasnes Construction Co., Inc.) v. N.L.R.B.*, 353 F. 2d 852 (C.A.D.C.), *Blue Flash Express, Inc.*, 109 NLRB 591; *Cannon Electric Co.*, 151 NLRB 1465

3. Phil Berg gave uncontradicted testimony of a conversation he had with Clark in the store a week or two after Respondent received the Union's March 22 letter.<sup>29</sup> Clark in effect related the consequences of representation by the Union. He indicated that "working conditions would have to be changed," and that the number of boys needed would be reduced because each boy would be required to do more work. I find the alleged violation of Section 8(a)(1).

4. Approximately in April, Store Manager Weiss spoke to Berg in the stockroom concerning the Union. Berg testified, "he asked me if I was in favor of the Union and I asked him if it would be held against me, he said no, and I said, 'Yes, I was.'" A few minutes later, Weiss told him that Clark said "that for two cents he would sell out and move back to Wisconsin."<sup>30</sup> The latter threat is found to violate Section 8(a)(1).

5. At the end of April, during a conversation in his office concerning the Union, Clark told Mary Williams that "he knew what he could pay without going into the red and it wasn't Union wages." Clark had previously told the stockboys he did not know or was not sure what the Union's wage demands would be. It is my view, upon consideration of all the evidence, that Clark's statement to Williams was not a reasonable prediction based upon fact but that it carried the implication, as intended, of coercively dissuading employees from their allegiance to the Union. The statement, I find, was violative of Section 8(a)(1).

6. About mid-April, a rumor was circulating that Mrs. Clark (wife of Respondent's president), who had some years back performed various jobs in the store, including that of produce manager, would be brought in again to work in the event the Union's efforts were successful. Mary Williams, who currently managed the produce section, asked Weiss if Mrs. Clark was coming back to work, and he stated that Clark "was thinking about it." When Judy Rosenkranz asked the same question of Weiss, he said "there was a possibility of that happening."<sup>31</sup> I find the evidence entirely too fragmentary and vague to support the allegation of a threat to Williams' job or other violation.

#### G. Ultimate finding of refusal to bargain

Respondent's contention of a good-faith doubt that the Union represented a majority of the employees is further effectively refuted by the evidence that it concurrently engaged in violations of Section 8(a)(1), as found. Its refusal to bargain with the Union while it committed these acts of coercion against the employees sufficiently indicates that Respondent was merely seeking to gain time within which to dissipate the Union's majority.<sup>32</sup> Accordingly, it is further concluded that, by its overall conduct, Respondent refused to bargain in good faith, in violation of Section 8(a)(5) 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 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 disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent unlawfully refused to bargain with the Union as the exclusive representative of its employees in an appropriate unit. It will therefore be recommended that Respondent, upon request, bargain collectively with the Union, and in the event that an understanding is reached, embody such understanding in a signed agreement.

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

<sup>29</sup> Berg added that "it might not have been that long." Thus, the conversation might well have occurred before the April 2 interviews.

<sup>30</sup> Weiss was not called to testify.

<sup>31</sup> As of September, Mrs. Clark had returned to work in the store "taking care of the payrolls."

<sup>32</sup> *Joy Silk Mills, Inc.*, 85 NLRB 1263, enfd. 185 F. 2d 732 (C.A.D.C.).

## CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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

4. Since March 20, 1965, the Union has been the exclusive representative of all employees in the following appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and part-time grocery, produce, and meat department employees of Respondent at its Rensselaer, Indiana, store, excluding the store manager, assistant manager, and all guards, professional employees, and supervisors as defined in the Act.

5. By refusing to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (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 basis of the above findings of fact and conclusions of law, and upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that Respondent, Tom's Supermarket, Inc., Rensselaer, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 25, Retail Clerks International Association, AFL-CIO, as the exclusive representative of all employees in the appropriate bargaining unit described hereinabove.

(b) Interrogating or polling employees in a coercive manner concerning their union sentiments and preference.

(c) Threatening employees with changes in their working schedules and conditions, reduction in working hours, closing down the store, or other reprisal, if they selected the Union as their bargaining representative.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

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

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

(b) Post at its Rensselaer, Indiana, store and warehouse, copies of the attached notice marked "Appendix."<sup>33</sup> Copies of said notice, to be furnished by the Regional Director for Region 25, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 25, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.<sup>34</sup>

It is further recommended that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

<sup>33</sup> If this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "a Decree of the United States Court of Appeals, Enforcing an Order" for the words "a Decision and Order."

<sup>34</sup> If this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 25, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT refuse to recognize and bargain with Local 25, Retail Clerks International Association, AFL-CIO, as the exclusive representative of the employees in the appropriate bargaining unit described below.

WE WILL NOT coercively interrogate or poll our employees concerning their union sentiments; threaten to change their working schedules and conditions, to reduce their working hours, close down our store, or other reprisal, because they selected the Union as their bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the right to self organization, to form labor organizations, to join or assist the above-named, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL, upon request, bargain collectively with the above-named Union as the exclusive representative of all employees in the bargaining unit with respect to rates of pay, wages, hours of employment and other conditions of employment, and if any understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and part-time grocery, produce, and meat department employees at the Rensselaer, Indiana, store, excluding the store manager, assistant manager, and all guards, professional employees, and supervisors as defined in the Act.

TOM'S SUPERMARKET, 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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana, Telephone No. 633-8921.

**B. J. Carney Company, Petitioner and Local Union No. 3-10, International Woodworkers of America, AFL-CIO. Case No. 19-UC-4. March 30, 1966**

DECISION AND REVIEW

On October 14, 1965, the Acting Regional Director for Region 19 dismissed a petition filed by the Employers to clarify the existing certified unit represented by the Union by excluding therefrom temporary employees. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed with the Board a timely request for review of the Acting Regional Director's Decision on the ground, *inter alia*, that the disputed employees, students employed during