

is a nonprofit, mutually owned water company which supplies all of its water for farm use. Therefore, we further find that the employees involved are "agricultural laborers" and that the Board is precluded from asserting jurisdiction over them.

Accordingly, we shall dismiss the petition.⁴

[The Board dismissed the representation petition.]

⁴In its answer to the Board's notice to show cause, the Petitioner opposed dismissal of the petition on the sole ground that the record does not establish that 95 percent or more of the water stored or supplied by the Employer is used for farming purposes. In view of the record facts, we cannot agree.

**Davis Cafeteria, Inc., and Polly Davis Broward Cafeteria, Inc.
and Hotel and Restaurant Employees & Bartenders Union,
Local 339, AFL-CIO. Case 12-CA-2606. September 14, 1966**

SUPPLEMENTAL DECISION AND ORDER

On November 20, 1963, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,¹ finding that the Respondents had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to recognize and bargain with the Union as collective-bargaining representative of the Respondents' employees in two separate units, namely, employees at the Respondents' Hollywood, Florida, cafeteria, and those at the Respondents' Fort Lauderdale, Florida, cafeteria. Thereafter, the Board filed a petition with the United States Court of Appeals for the Fifth Circuit for enforcement of its Order. The court denied enforcement of the Board's Order, and, citing *Metropolitan Life Insurance Company*,² remanded the case to the Board to further explicate the basis for its unit determination in the underlying representation proceeding.

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

The essential facts, which are not in dispute, are as follows: The Respondents herein, Davis Cafeteria, Inc., located in Hollywood, Florida, hereinafter referred to as Davis, and Polly Davis Broward Cafeteria, Inc., located at Fort Lauderdale, Florida, hereinafter referred to as Broward, are wholly owned subsidiaries of Miami Cafeteria, Inc. The latter has its general offices in Miami, and oper-

¹ 145 NLRB 82.

² *N.L.R.B. v. Metropolitan Life Insurance Company*, 380 U.S. 438

160 NLRB No. 80.

ates, in addition to the foregoing, six cafeterias in and around Miami (Dade County).³ Davis and Broward are 18 and 25 miles, respectively, from the general offices of Miami, and are 8 miles from each other. The general manager of Miami has overall supervision for the chain, and, for some administrative purposes, the eight cafeterias are grouped into districts, each of which is headed by a district supervisor. Davis and Broward are in the same administrative district as the cafeterias of Davis Colonial, Inc., and Polly Davis Cafeteria, Inc., both of which are in the Miami area (Dade County), about 20 miles from the Broward County cafeterias.

Each cafeteria is under the management and direction of a local manager, who is ultimately responsible for all aspects of his cafeteria's day-to-day operation. He represents his store in district and general management meetings. He is personally responsible for the placing of all orders, whether for foods, supplies, decorations, maintenance, advertisements, or other miscellaneous items, subject only to his use of the approved list of suppliers furnished each cafeteria by the general office. Each local manager has the authority independently to hire, discharge, and discipline employees, and may initiate pay raises, although he cannot grant them. Local managers direct the preparation of food from master menus, provided by the general office, which also sets food prices. Each cafeteria has a separate bank account, although only general office personnel can draw checks on the account, and each manager can obligate the credit of the Company in purchases of miscellaneous supplies. The general office maintains personnel, payroll, and social security records of all cafeteria employees, and makes up their pay checks. A separate account is maintained in the general office for each cafeteria. General labor policy, rates of pay, hours of employment, insurance benefits, and overtime⁴ and vacation⁵ periods are fixed by the general office, which also tabulates suppliers' competitive bids on "bid sheets," which govern local cafeteria managers in purchasing food and supplies. There is little or no employee interchange between the various cafeterias, and no collective-bargaining history.

The Regional Director found that "despite the centralization of labor policies and certain other aspects of the cafeterias' operations," separate units composed of employees of the Davis and Broward cafeterias were appropriate. He relied on the high degree of local autonomy of each cafeteria, the lack of employee interchange, and the geographical separation of the operations. The Board denied

³ All eight cafeterias are operated under the trade name "Polly Davis."

⁴ Each manager, however, decides when overtime is to be worked, and which employees are to do it, after consulting with the district supervisor.

⁵ Each manager, however, schedules the vacation period of each of his employees.

review, and, in the subsequent unfair labor practice proceeding, found that the Respondents had violated Section 8(a)(5) of the Act by refusing, on the ground of inappropriate units, to recognize and bargain with the Union. As stated, the court remanded the case to the Board, upon the ground that neither "the Regional Director, the Examiner nor the Board has disclosed the basis for the unit determination."

The crux of the Respondents' argument, in the Board proceedings and before the court, was that the appropriate unit in this case should comprise all of the eight cafeterias in the chain, or, in the alternative, that the unit should embrace the administrative grouping of the Respondents' cafeterias comprising the Davis and Broward cafeterias in Broward County and the two Miami area cafeterias in Dade County. In this connection, it is argued that Respondents' operation is a completely integrated one, and that to find appropriate single cafeteria units, as the Board has done in the instant case, is to segment and fragmentize into single units a completely and totally integrated cafeteria chain operation. Finally, it is contended that the single cafeteria units established by the Board's decision is based upon extent of organization, and, thus, is contrary to Section 9(c)(5) of the Act.⁶

The sole affirmative guide as to what constitutes an appropriate bargaining unit is contained in Section 9(b) of the Act, which reads:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof

As the Court of Appeals for the Fifth Circuit observed in *N.L.R.B. v. Belcher Towing Company*,⁷ Congress authorized the Board to make the determination as to what is an appropriate unit, and, in making this determination, a wide discretion has been vested with the Board. Under this broad delegation of authority, the Board, in determining whether the unit petitioned for in a particular case is appropriate, has, with court approval, traditionally looked to such factors as the community of interest among the employees sought to be represented; whether they comprise a homogeneous, identifiable, and distinct group; whether they are interchanged with other employees; the extent of common supervision; the previous history of bargaining; and the geographic proximity of the various parts of the employer's

⁶ Section 9(c)(5) provides: "In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling."

⁷ 284 F.2d 118, 120.

operation.⁸ Moreover, it is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining.⁹

In *Sav-On Drugs, Inc.*,¹⁰ the Board reexamined its unit policies in the retail chain industry and modified its prior rule that the appropriate unit in retail chain operations must be coextensive with the employer's administrative decision or the geographical area involved. The Board there affirmatively stated that it would apply to retail chain operations the same unit policy that it applies to multiplant enterprises in general, that is, that it would determine the appropriateness of a proposed unit confined to one of two or more retail establishments in a chain in the light of all the relevant circumstances of the particular case.

In the recent *Purity Food Stores* case,¹¹ the Board further defined its policy in connection with the appropriateness of single store units in a retail chain operation. In *Purity Food*, the Board found that the evidence demonstrated that the employer's Peabody, Massachusetts, store, which, as a retail outlet, was the analogue of the industrial plant, possessed significant autonomy within the employer's overall operations, and was composed of employees closely and distinctly related in location and function. The Board held, essentially, that despite a substantial degree of centralized control in the employer's operation, a common attribute of all chain store operations, the employer's Peabody store constituted "a distinct, self-contained economic unit," and was, therefore, an inherently appropriate bargaining unit. The Board stated that "to regard Respondent's administrative structure as defeating the appropriateness of the single store unit would artificially disadvantage the organizational interests of these and other chainstore employees, simply because their employer operates a chain rather than a single store enterprise" and would undermine the principles stated in *Sav-On Drugs*. In finding appropriate a unit limited to the Peabody store employees, the Board said:

The Peabody store employees regularly work together and have common interests in relations to their Employer, some of which are separate and apart from those of employees in other locations. The freedom of choice of this one cohesive group of employees to have or not to have a bargaining representative should not be dependent upon the interest or lack of interest in such repre-

⁸ See, for example, *May Department Stores d/b/a Famous-Barr Company v. N.L.R.B.*, 326 U.S. 376, 380.

⁹ See, for example, *General Instrument Corp. v. N.L.R.B.*, 319 F.2d 420, 422, 423 (C.A. 4), cert. denied 375 U.S. 966; *Mountain States Telephone and Telegraph Co. v. N.L.R.B.*, 310 F.2d 478, 480 (C.A. 10).

¹⁰ 138 NLRB 1032.

¹¹ *Purity Food Stores Inc. (Sav-More Food Stores)*, 160 NLRB 651.

sentation on the part of other employees in separated, and in this case somewhat distant, retail chain outlets serving other markets in a populous area. As heretofore indicated, there is a substantial amount of hiring done at the Peabody store and of autonomy in the direction of day-to-day operations, reflecting the Respondent's own allocation of distinct responsibilities there [T]he impact of any labor dispute at the Peabody store is not likely to be felt at Respondent's other outlets which serve different markets. In our judgment, the institution of localized bargaining on behalf of the separate, identifiable group of Peabody employees, involving, *inter alia*, such matters as the establishment and administration of local work rules, grievance protections, vacation programs, seniority and pension rights, as well as the setting of wage rates, is not only entirely feasible, but would not unduly encroach on the Employer's various administrative controls. (Footnotes omitted.)

Applying the principles stated in *Sav-On Drugs* and *Purity Food Stores* to the facts in this case, we reaffirm our finding that separate units of employees at the Davis and Broward cafeterias are appropriate.

There are, concededly, a number of factors which would appear to militate in favor of the appropriateness of a multi-cafeteria unit. Thus, there is a degree of functional integration between the central office and the eight cafeterias operated by the Respondents, as evidenced by the facts that personnel, payroll, and social security records are kept by the general office; the general office determines labor policy, rates of pay, hours of work, and insurance benefits; and the general office supplies a master menu for the assistance of the local managers, and determines the food prices to be charged to customers.

On the other hand, as in *Purity Food*, we do not believe that the record here discloses that degree of functional integration necessary to defeat the separate identity of the Davis and Broward cafeterias. We note, initially, that local cafeteria managers possess considerable autonomy. Thus, they may hire, discharge, and discipline employees, initiate wage increases, schedule individual employee vacations, and determine overtime needs. Each cafeteria has a separate bank account, and each manager may obligate its credit in purchasing supplies necessary to the conduct of the business. The substantial autonomy of the Respondents' Davis and Broward cafeterias compels us, as in *Purity Food*, to conclude that these cafeterias are distinct, self-contained economic units. In view thereof, and in the light of the geographical separation of the Davis and Broward cafeterias from the other cafeterias in the Respondents' chain, the lack of any

employee interchange among the various cafeterias, the absence of any bargaining history at any of the Respondents' facilities, and the fact that no labor organization is seeking to represent employees on a broader basis, we find that separate units of employees at the Respondents' Davis and Broward cafeterias are appropriate. This unit, we believe, conforms fully with the provisions of the Act, and, in our opinion, assures to employees the fullest freedom in exercising their rights guaranteed under the Act.¹²

We find no merit in the Respondents' contention that this finding is based on the extent of union organization, and therefore, contrary to Section 9(c) (5) of the Act. It is now well established that Section 9(c) (5) was intended only to preclude the Board from basing its unit determination solely on extent of organization when other relevant criteria of appropriateness are absent. It was not intended to invalidate units which, as here, qualify under other tests of appropriateness.¹³

In remanding the case, the court pointed out that the Board did not indicate what effect, if any, it gave to testimony by the union agent that the Union would not accept a unit which included cafeterias outside Broward County, because it had no jurisdiction in Dade County. In making unit determinations, the Board must, of course, consider which unit or units of employees the union seeks to represent. But this is true only because it is a union petition which normally sets in motion the Board's representation procedure. It is also clear that a union's unit request may be based on any number of factors, including the extent of its jurisdiction. However, the issue before the Board in a representation case is not *why* the union seeks to represent the employees in a particular unit but, rather, whether the unit of employees it seeks to represent is appropriate. Here, on the basis of the factors set forth above, and without regard to the geographical limitations of the Union's jurisdiction, we find that separate units of employees at the Davis and Broward cafeterias are appropriate.¹⁴

The court also indicated that it found it "difficult to reconcile" the unit finding in this case with that of the Regional Director in the contemporaneous unreported decision in *Bickford's Inc.*¹⁵ In our view, the facts in *Bickford's* are significantly different from those in the instant case, particularly since there, unlike here, the Regional Direc-

¹² *Sun Drug Co., Inc.*, 147 NLRB 669, enf'd. 359 F.2d 408 (C.A. 3).

¹³ *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra*; *Metropolitan Life Insurance Co. (Woonsocket, R.I.)*, 156 NLRB 1408, footnote 20.

¹⁴ See, for example, *Associated Grocers, Incorporated*, 142 NLRB 576, 577-578; *A. F. Hoover and Company*, 134 NLRB 573, 575; *Paaton Wholesale Grocery Company*, 123 NLRB 316, 317.

¹⁵ *Bickford's Inc., d/b/a M & M Cafeteria*, Cases 12-RC-1617 and 1618 (not published in NLRB volumes).

tor found a "lack of every-day autonomous control in the operation of the local cafeterias." We acknowledge, however, that the court characterized as "futile" any attempts to distinguish the two cases on factual grounds. But the court apparently has overlooked the differing procedural posture of the two cases. In *Bickford's*, the Regional Directors found the units sought inappropriate, and the parties did not seek Board review of this determination. In this case, on the other hand, the Employer requested the Board to review the Regional Director's determination that the units sought were appropriate and the Board denied the Employer's request. We have now considered the Respondents' contentions a second time in light of the court's decision remanding this case and in light of the Regional Director's determination in *Bickford's*, and we again find him to be without merit.¹⁶

Accordingly, we reaffirm our previous finding that the Respondents violated Section 8(a)(5) of the Act by refusing to bargain with the Union as the exclusive bargaining representative of the Respondents' employees.

[The Board reaffirmed its Order of November 20, 1963, in this proceeding.]

¹⁶ We need not and therefore do not decide whether, if review had been requested in the *Bickford's* case, we would have affirmed the Regional Director's unit findings.

Lane Drug Co., Division of A. C. Israel Commodity Corporation ; Lane's of Sylvania, Inc. ; Lane's of Bowling Green, Inc. ; Lane's of Oregon, Inc. and Retail Store Employees Union Local 954, Retail Clerks International Association, AFL-CIO. Case 8-CA-3885. September 15, 1966

DECISION AND ORDER

On April 26, 1966, Trial Examiner Stanley N. Ohlbaum issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondents had not engaged in certain other unfair labor practices and recommended that the complaint be dismissed with respect thereto. Thereafter, the Respondents filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed a brief in answer to the Respondents' exceptions. The Charging Party filed a brief in support of the Trial Examiner's Decision.