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, 1624 Wachovia Building, 301 North Main Street, Winston-Salem, North Carolina 27101, Telephone 723-2302.

J. C. Penney Company, Store No. 1093 *and* Retail Clerks International Association, Local Union No. 1564, AFL-CIO. *Case 28-CA-1286. October 18, 1966*

DECISION AND ORDER

On June 17, 1966, Trial Examiner James R. Webster 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. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief.

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 [Chairman McCulloch and Members Fanning 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. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.

[The Board adopted the Trial Examiner's Recommended Order with the following modifications:

[1. Paragraph 1(c) of the Trial Examiner's Recommended Order is amended to read as follows:

["(a) Granting wage increases to employees without bargaining and consulting with Retail Clerks International Association, Local Union No. 1564, AFL-CIO; provided, however, that nothing in this Decision and Order shall be construed as requiring the Respondent to vary or abandon any wage increases or other economic benefit which it has heretofore established."

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[1] We adopt the Trial Examiner's conclusion that Petitioner did not waive the right to bargain over merit wage increases. Although such a right may be waived by collective bargaining, a waiver will not be readily inferred; there must be a clear and unmistakable showing that the waiver occurred. *Clifton Precision Products,* 156 NLRB 555.

[2 Amend the first indented paragraph of the notice to read

[WE WILL NOT grant wage increases to our employees without consulting and bargaining with Retail Clerks International Association, Local Union No 1564, AFL–CIO, or any other labor organization of our employees, we are not required, however, to abandon the wage increases heretofore granted to our employees]

TRIAL EXAMINER S DECISION

STATEMENT OF THE CASE

This case with all parties represented was heard before Trial Examiner James R Webster in Taos New Mexico on March 10 and 11 1966 on complaint of the General Counsel and answer of J C Penney Company Store No 1093 herein called Respondent or Company The complaint was issued on November 19 1965 upon a charge filed October 11 1965 The complaint alleges that Respondent unilaterally increased wages on or about June 28 1965 and refused to recognize and bargain collectively with the Union at all times following September 28 1965 thereby violating Section 8(a)(1) and (5) of the National Labor Relations Act herein called the Act

Briefs have been filed by the General Counsel and the Respondent and have been carefully considered Upon the entire record and my observation of the witnesses I hereby make the following

FINDINGS OF FACT

I THE BUSINESS OF THE EMPLOYER

During the past 12 month period Respondent in the course and conduct of its business operations sold and distributed products the gross value of which exceeded $500 000 During the same period of time Respondent purchased and caused to be shipped directly into the State of New Mexico from other States of the United States merchandise valued in excess of $50 000

I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act

II THE LABOR ORGANIZATION INVOLVED

The Retail Clerks International Association Local Union No 1564 AFL–CIO herein called the Union is a labor organization within the meaning of Section 2(5) of the Act

III THE ALLEGED UNFAIR LABOR PRACTICE

A *Preliminary statement of facts*

On January 16 1964 a majority of all employees including regular part time employees at Respondent s Store No 1093 excluding store managers guards professional employees and supervisors as defined in the Act designated and selected the Union as their bargaining representative by secret ballot and on January 24 1964 the Regional Director for Region 28 of the Board certified the Union as the exclusive bargaining representative of these employees

On October 20 1964 a collective bargaining agreement was executed by Respondent and the Union effective from that date to October 1 1965

On June 28 and July 12 1965 Respondent gave wage increases to each of the 18 employees in the appropriate unit (Two employees one having been rehired July 1 received their increases on July 12 1965) The increases varied from 5 cents to 12 cents per hour Respondent contends that these were all merit wage increases and that the Union had agreed that Respondent could make merit wages increases without consultation with the Union

By letter dated August 16 1965 the Union asked that negotiations be opened for a new contract as the contract then in effect was due to expire on October 1 1965 Meetings were held in September 1965 and on September 28 Respondent s attorney Robert Poole told the union negotiators that Respondent questioned the Union s majority status and that there was no need to negotiate after October 1 1965 until

the Union proved its majority Respondent based its doubt of majority status on the fact that several employees had approached management and inquired as to the pro cedure for getting out of the Union On October 4 1965 Respondent filed a repre sentation petition in Case 28–RM–142 and announced to employees that as of October 1 there was no longer a union in the store as the contract had expired On October 11 1965 the Union filed the charge in the instant case and on Decem ber 28 1965 the Regional Director dismissed Case 28–RM–142 as a complaint had issued in the instant case

B *Issues*

1 Did the Union waive its right to bargain on merit wage increases during the term of the existing contract and were the wage increases given in June and July merit wage increases?

2 Did Respondent have a good faith doubt of the Union s majority status on September 28 1965?

C *The unilateral wage increases*

Respondent contends that during the contract negotiations in September and Octo ber 1964 the Union agreed that the Respondent could make merit wage increases during the term of the contract without consulting with the Union The significant bargaining sessions culminating in the collective bargaining agreement were held on September 16 and October 8 1964 At both of these sessions a Federal mediator participated For the most part negotiations were conducted with the negotiators for each group in separate rooms and with the mediator talking first with one group and then with the other and relaying proposals and positions At the meeting of September 16 the Respondent proposed a 2½ cent across the board wage increase with a continuation of its merit wage increase policy [1]

The Union made a new proposal at this meeting for a 10 cent wage increase to be effective on the signing of the contract and another 10 cent increase during the course of the contract and the Union sought a 2 to 3 year contract In caucus Union Representative Elmer Hipsky told the mediator that merit increases would have to be negotiated through the Union and that the Union would strike on this point

Following this meeting and on October 2 1964 Respondent s attorney Robert Poole contacted the mediator and advised him that Respondent would agree to a 5 cent across the board wage increase and a contract of 1½ years duration

At the meeting of October 8 1964 Poole stated as the meeting began that Respondent was willing to grant a 5 cent per hour wage increase and that this was its final offer He made no reference to the Respondent s merit increase program at this point Again as had occurred in prior meetings the negotiation broke into separate groups During the caucus with the union committee the mediator was again told by Union Representative Hipsky that if there were to be merit increases these would have to be negotiated and that if the Company made these increases without negotiating with the Union they would strike the store

After talking with union representatives the mediator approached the company negotiators with the statement that he thought there was a possibility of an agree ment however three things would have to be clarified (1) Would there be any reduction of hours of work for any of the employees (2) were there not some employees that had actually been decreased recently (3) as to the merit increases would these be unilateral or would there be a merit review board on which employ ees would be represented

As to the first question a company negotiator (Store Manager Sloniger) replied Why should there be any reduction of hours of work As to the second question Store Manager Sloniger replied that one employee had been away from work for some time and actually started out at a lower rate on her return than the one she had previously As to the third question Sloniger replied that it was company policy to have performance reviews and that the Company had the right to grant increases for merit The mediator was also told that Respondent would agree to a 1 year con tract rather than one for a year and a half

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[1] Respondent in accordance with provisions of a personnel manual has had a policy of making annual performance reviews on all employees However it appears that this policy was not followed at Store No 1093 for 3 or more years prior to June 1965 at least there are no records of any Respondent s store manager in Taos during these years and until February 1965 was a Mr Sloniger who was hospitalized on February 10 1965 with a diagnosis of encephalitis and who had been in a highly emotional state for some time

The mediator then returned to the union committee, and later returned to the company committee with an inquiry as to how long the offer would be outstanding. The Respondent agreed to leave it open until the end of the week—October 12, 1965.[2]

I am of the opinion that there has been no meeting of the minds between the parties as to how merit wage increases would be handled. There is nothing in the contract on this matter;[3] and there is no evidence that any statement of agreement on this matter was made by one party to the other. Respondent sought to continue in effect its policy of periodic evaluations of employees with periodic increases depending upon the merit of the employee involved. The Union was firm on its position that merit wage increases were bargainable matters, although at the sessions of September 16 and October 8, this position was not expressed by the union negotiators directly to Respondent, but was stated to the Federal mediator in caucus. At the last meeting, October 8, Respondent agreed to give a 5-cent across-the-board wage increase with a 1-year contract; the Union took this matter under advisement, and it was voted upon and accepted by the union membership.

The General Counsel also raises the issue as to whether or not the increases given in June and July, 1965, were "merit increases" since all employees received them. The wage increases given differed with employees; likewise the merit evaluation of employees differed. Respondent contends that, in view of the fact that evaluations of employees had not been conducted for a number of years, evaluations covering all employees were in order in June 1965.

I suppose any increase in wages given is "merited," but in a truer sense, a merit wage increase is one that differentiates between and rewards employees in accordance with their relative merit. In the instant situation, all employees received at least a 5-cent-per-hour increase—some, and apparently for considerations of merit, received increases of 7 cents, 9 cents, 10 cents, and 12 cents per hour. I am inclined to the view and find that a general 5-cent-per-hour wage increase was given and only those increases above this amount were true merit increases. However, I also find that the Union did not waive its right to bargain on merit wage increases. Therefore, by the unilateral increases given on June 28 and July 12, 1965, I find that Respondent refused to bargain in good faith with the Union and thereby violated Section 8(a)(5) and (1) of the Act.[4]

D. *Respondent's doubt of the Union's majority and refusal to meet*

Following the Union's request of August 16, 1965, to open negotiations on a new contract, Attorney Poole and Union Representative Hipsky held three meetings in September 1965. A union proposal was submitted and there was some agreement on some items. At the last meeting, September 28, 1965, Respondent questioned the Union's majority status and declined to meet with the Union for negotiations on a new contract after October 1, 1965, unless the Union reestablish that it represents a majority of the employees. On October 4, 1965, the Respondent filed a representation petition. Through the month of September 1965, a majority of employees in the appropriate unit were dues paying members of the Union. On June 28, 1965, the date of the unilateral wage increases, there were 17 employees in the unit, of whom 11 were dues paying members. In September 1965, there were 18 employees in the unit of whom 11 were dues paying members. In October 1965, there were 17 employees of whom 3 were dues paying members.

The contract between the parties, effective from October 20, 1964, to October 1, 1965, provided as a condition of employment that "all employees of the Employer covered by This Agreement who are members of the Union in good standing on the

[2] There is no testimony as to what the mediator reported to the union committee other than that he came back with an offer of 5 cents an hour and a 1-year contract. Union Representative Hipsky does not recall any mention of a merit review board with union participation, and it is not clear whether the three questions presented by the mediator to the Respondent originated with the union committee or with the mediator.

[3] I reject Respondent's contention that article VII of the contract providing that "wages paid in excess of the minimum established in this agreement are to be paid to the individual and not to the job," reserves to Respondent the right to grant merit increases unilaterally.

[4] *Purity Food Stores, Inc*, 150 NLRB 1523; *N.L.R.B.* v. *Benne Katz*, 369 U.S. 736.

I also reject Respondent's contention that the Union is obligated to invoke the contract grievance procedure on this matter prior to filing charge herein. An interpretation of provisions of a contract is not involved here as it was in *N.L.R.B.* v. *O & O Plywood Corp.*, 351 F.2d 224 (C.A. 9).

effective date of this Agreement shall remain members in good standing Those employees who are not members on the effective date of this Agreement may on the Thirty first (31st) day following the effective date of this Agreement become members of the Union in which event they shall remain members in good standing in the Union for the balance of the Agreement

Manuel Gonzales who became acting store manager in February 1965 and store manager in August 1965 testified that during the time he was at the store five employees expressed to him some dissatisfaction with the Union—two of these he recalled as having occurred prior to June 28 and he did not remember when the other three employees approached him on the matter One told him that the union negotiations would be coming up soon and that she did not want to be subjected to harassment by other employees because of having to belong to the Union another employee had become delinquent in union dues and inquired as to how to get out of the Union another complained about being called on her days off or while at work to attend union meetings and stated that she did not want to belong to the Union Based on these reports and the fact that those who had joined the Union at the outset were required to continue to pay dues during the term of the contract Respondent contends that in September 1965 it had and has a good faith doubt that a majority of the employees wanted to belong to the Union

On October 4 1965 on the same day that Respondent filed a representation peti tion Emmet F Dawson a district manager for J C Penney Company told employ ees at a store meeting that as of October 1st there is no Union in the store as the contract has expired Therefore it is no longer a condition of employment at this time that you belong to the Union or pay your dues [5] Thereafter all but three employees discontinued paying dues A union meeting held in October 1965 how ever was attended by six employees

Although prior to October 1 1965 five employees had expressed to Store Man ager Gonzales some dissatisfaction with the Union and in October 1965 7 of 11 employees paying union dues discontinued doing so the conduct of Respondent pre ceding these events cannot be ignored for its casual relationship with the expression of dissatisfaction and discontinuance of dues On June 28 and July 12 all of the employees in the unit were given wage increases without notification to or consul tation with the Union on September 28 the Union was notified that there was no need to negotiate after October 1 as Respondent questioned its majority status on October 4 District Manager Dawson told employees that as of October 1 there was no union in the store the contract had expired and that union membership or pay ment of union dues was no longer a condition of employment Thereafter 7 of the 11 employees paying dues discontinued doing so

I cannot find from the evidence that the Union had or would have lost its major ity status irrespective of the June 28 unilateral wage increase the September 28 announced refusal to negotiate further and the October 4 announcement that there was no union in the store At the time of these events the Union represented a majority of the employees I find that by this conduct Respondent has refused to bargain with the Union thereby violating Section 8(a)(5) and (1) of the Act An employer cannot be relieved of his obligation to bargain with a union on the grounds that the union has lost its majority status where the employer has engaged in unfair labor practices calculated to have that effect [6]

IV THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III occurring in connection with the operations of Respondent described in section I have a close, intimate and sub stantial 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 thereof

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

CONCLUSIONS OF LAW

1 Respondent is an employer engaged in commerce within the meaning of Sec tion 2(2) (6) and (7) of the Act

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[5] There is some conflict of testimony as to whether he mentioned the expiration of the contract one employee recalled that he did the two employees who do not recall it stated that they knew the contract was due to expire on October 1 1965 Dawson read from a prepared statement I credit his version of his statement

[6] *Priced-Less Discount Foods Inc* 157 NLRB 1143

2. Retail Clerks International Association, Local Union No. 1564, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees, including regular part-time employees at Respondent's Store No. 1093, excluding store managers, guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since January 24, 1964, the Union has been the exclusive representative of all employees of Respondent in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act

5. By its unilateral grant of wage increases in June and July 1965, and by its refusal to meet and bargain with the Union following September 28, 1965, Respondent has thereby violated Section 8(a)(5) and (1) of the Act.

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

THE REMEDY

Having found that Respondent has engaged in conduct constituting a refusal to bargain with the Union, it will be recommended that it cease and desist therefrom, and that, upon request, it bargain collectively with the Union, and that it post appropriate notice to employees as provided in the Recommended Order set forth below.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER

J. C. Penney Company, Store No. 1093, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Granting wage increases to employees without bargaining and consulting with Retail Clerks International Association, Local Union No. 1564, AFL–CIO.

(b) Refusing to bargain collectively with said Union as the exclusive bargaining representative of all employees, including regular part-time employees at Respondent's Store No. 1093, excluding store managers, guards, professional employees and supervisors as defined in the Act.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist the above-named Union or any other labor organization of their choice, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Retail Clerks International Association, Local Union No. 1564, AFL–CIO, as the exclusive representative of all employees in the above-described bargaining unit, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its store in Taos, New Mexico, copies of the attached notice marked "Appendix."[7] Copies of said notice to be furnished by the Regional Director for Region 28 after being signed by a managing representative of Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

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[7] In the event that this Recommended Order is 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. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

(c) Notify the said Regional Director, in writing, within 20 days of the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.[8]

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 grant wage increases to our employees without consulting and bargaining with Retail Clerks International Association, Local Union No. 1564, AFL–CIO, or any other labor organization of our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce any of our employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in any other concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the Act, or to refrain from any or all such activities, except to the extent that such rights may be affected by the proviso in Section 8(a)(3) of the Act.

WE WILL, upon request, bargain collectively with Retail Clerks International Association, Local Union No. 1564, AFL–CIO, as the collective-bargaining representative of all of our employees, including regular part-time employees at our Store No. 1093, excluding store managers, guards, professional employees and supervisors as defined in the Act, and if an understanding is reached, embody such understanding in a signed agreement.

All of our employees are free to become or to remain, or to refrain from becoming or remaining, members of the above-named Union, or any other labor organization except to the extent that such rights may be affected by the proviso in Section 8(a)(3) of the Act.

J. C. PENNY COMPANY, STORE NO. 1093,
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, Room 7011, Seventh Floor, Federal Building and United States Courthouse, 500 Gold Avenue SW., Albuquerque, New Mexico 87101, Telephone 247–0311.

[8] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

Stop & Shop, Inc. ***and*** **Gary A. Machaby.** *Case 1–CA–4937. October 19, 1966*

DECISION AND ORDER

On December 23, 1965, Trial Examiner W. Gerard Ryan 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