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If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Sixth Floor, 707 North Calvert Street, Baltimore, Maryland 21202, Telephone 752-2159.

**A. G. Pollard Company and Local 372, Retail Clerks International Association, AFL-CIO.** *Case 1-CA-5451. December 2, 1966*

DECISION AND ORDER

On August 15, 1966, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's 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 Jenkins and Zagoria].

The Board has considered the Trial Examiner's Decision, the exceptions, the brief, 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

The Representation Proceeding<sup>1</sup>

Pursuant to a Decision and Direction of Election by the Regional Director for Region 1 of the National Labor Relations Board, herein called the Board, an election by secret ballot was conducted on December 13, 1965, among the employees of A. G. Pollard Company, herein called the Respondent.<sup>2</sup> In this election, Local 372, Retail Clerks International Association, AFL-CIO, herein called the Union, received a

<sup>1</sup> Official notice is taken of the representation proceeding. See Section 9(d) of the National Labor Relations Act.

<sup>2</sup> The bargaining unit found appropriate by the Regional Director, and in which the election was held, is as follows:

All full-time and regular part-time selling and nonselling employees at the Respondent's Lowell, Massachusetts retail store, including cash auditors, commission personnel in the Ladies Ready-to-Wear Department, Cosmetic Department employees and watchmen/maintenance employees, but excluding part-time employees working less than fifteen (15) hours per week, leased department employees, commission personnel in the Furniture, Rugs, Fur, Appliance, Menswear and Interior Decorating Departments, employees of the Old Homestead House, Bedford, Massachusetts, confidential secretaries, professional employees, guards, supervisory trainees, department heads, assistant buyers, assistant buyer trainees, buyers and all other supervisors as defined in Section 2(11) of the Act.

plurality of the votes cast. However challenged ballots were sufficient to affect the results of the election. Thereafter, both the Union and the Respondent filed timely objections to conduct affecting the results of the election. The Regional Director having investigated the objections issued a Supplemental Decision overruling the objections and directing the opening of certain challenged ballots and sustaining the challenges as to two others. The Respondent thereupon filed a Request for Review of the Supplemental Decision with the Board.

On March 4, 1966, the Regional Director issued a Second Supplemental Decision indicating that, after opening a number of the challenged ballots, the Union had received a majority of all the ballots cast in the December 13, 1965, election. The issuance of a certification of representative was deferred, however, pending the Board's disposition of Respondent's request for review of the first Supplemental Decision. Thereafter, on April 4, 1966, the Board denied Respondent's Request for Review. Under Section 102.67(f) of the Board's Rules and Regulations, Series 8, as amended, the Board's denial of review constituted an affirmation of the Regional Director's action and precludes relitigation of any such issues in a related subsequent unfair labor practice proceeding. Accordingly on April 6, 1966, the Regional Director issued a certification of representative certifying the Union as the collective-bargaining representative for the employees in the appropriate unit.

### The Complaint Proceeding

Upon a charge filed by the Union on May 3, 1966, the General Counsel caused a complaint and notice of hearing to be issued alleging that the Respondent committed unfair labor practices in violation of Section 8(a)(1) and (5) of the Act by refusing since on or about April 18, 1966, to bargain with the Union upon demand.

In due course the Respondent filed its answer to the complaint in which it denied the commission of unfair labor practices by asserting: that the unit was not appropriate for the purposes of collective bargaining;<sup>3</sup> that the election results were invalid because certain ballots were improperly counted and if there were a majority it was obtained under duress and coercion; and that the majority was obtained improperly and illegally as a result of a speech containing false statements and threats illegally and improperly attempting to influence, and influencing the election; that the Union was not, therefore, properly certified as the exclusive representative of the unit employees; and that the Union never requested Respondent to bargain collectively. Other material allegations of the complaint were admitted.

On July 1, 1966, the General Counsel filed a motion for judgment on the pleadings based on the ground that the material issues or facts raised in Respondent's answer had already been litigated in the representation case and were not now open to relitigation. Upon an Order to Show Cause issued by Trial Examiner Charles W. Schneider on July 8, 1966, returnable July 18, directing the parties to show cause, if any, as to whether or not the motion for judgment should be granted, the Respondent filed an opposition to the General Counsel's motion for judgment on the pleadings.

### Ruling on the Motion for Judgment on the Pleadings

In its opposition to the motion for judgment on the pleadings the Respondent's first contention is that the Union is not a properly designated representative for the purposes of collective bargaining; in sum that the representation case was wrongly decided.

The Respondent is thus seeking to relitigate here the correctness of the actions of the Board and Regional Director in dismissing its objections to the election and in subsequently certifying the Union. This it may not do. In the absence of newly discovered or previously unavailable evidence, issues which were or could have been raised in a related representation case may not be relitigated in an unfair labor practice proceeding.<sup>4</sup> There is no contention by the Respondent that it would seek to

<sup>3</sup> The Respondent filed no request with the Board to review the Regional Director's finding as to the appropriate unit. Under Section 102.67(f) of the Board's Rules, failure to request review precludes relitigation in any related subsequent unfair labor practice proceeding of any issue which was or could have been raised in the representation proceeding.

<sup>4</sup> *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, *United States Rubber Company*, 155 NLRB 1298; *Producers Inc.*, 133 NLRB 701, 704. As the Board said in the *Producers* case:

It is the policy of the Board not to allow a party to relitigate in a Complaint proceeding such as this one the legal effect of matters which the party has already litigated and the Board has decided in a prior representation proceeding.

adduce such evidence at a hearing before a Trial Examiner. The Respondent may raise its contentions as to the invalidity of the certification before the Board and the Courts. However at the present stage of the proceedings the dispositions by the Board and the Regional Director constitute the law of the case and are binding on the Trial Examiner.

The Respondent further contends that it has not refused to bargain because it did not receive a specific request to bargain from the Union and therefore may stand on its privilege to remain silent until such time as the Union issues a clear and unambiguous statement specifically requesting bargaining.

In a union letter, dated April 18, 1966, sent by Joseph Mello, secretary-treasurer of the Union, and addressed to Sheppard Bartlett, executive vice president of Respondent Company, the Union requested a meeting with Respondent "relative to the negotiations [sic] of a collective-bargaining agreement." The letter continued, "I would suggest a preliminary meeting . . . April 25 or 26 . . . for the purpose of establishing the mechanics involved in negotiations so that our discussions may be efficient and fruitful." Counsel for the Respondent replied by letter to Mr. Mello dated April 26, 1966, as follows:

As attorney for and on behalf of A. G. Pollard Company and in reference to your letter dated April 18, 1966, please be advised that our client considers the certification by the National Labor Relations Board unlawful and erroneous.

The Respondent now contends that the Union's letter did not contain a request to bargain and asserts that the only request in the letter concerned a procedural conference to discuss the "mechanics of negotiation" a subject, it says, not within the scope of required bargaining as defined by Section 8(d) of the Act.

The Respondent's contention cannot be sustained. The mechanics involved in negotiations may be a relevant part of collective bargaining. The Union's request for a preliminary meeting was in effect a request to start the bargaining process. The fact that the Union wished to devote the first of their collective-bargaining sessions to the establishment of the framework in which they would work does not alter the obvious intent of the Union to begin negotiations. In any event the Respondent's present contention appears to be an afterthought, and not the reason for its failure to honor the Union's request. Thus the Respondent's reply to the Union's letter indicates that it was rejecting the Union's request because the certification was invalid. There is no indication therein that the Respondent considered the request itself defective. It is found that the Union's letter of April 18, 1966, was a valid request to bargain and that the Respondent's failure to grant that request was a refusal to bargain.

All material issues having thus been decided, or admitted in the answer to the complaint, there are no matters requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's motion for judgment on the pleadings is granted. On the basis of the record before me I make the following further findings:

#### I. JURISDICTION

A. G. Pollard Company, is and has been at all times material herein, a Massachusetts corporation with its principal office and place of business at Merrimack Street in the city of Lowell, Massachusetts, where it is engaged in the sale and distribution of clothing, furniture, appliances, household and domestic goods, and related products.

Annually, the Respondent, in the course and conduct of its business sells and distributes products valued in excess of \$500,000. During the same period of time, Respondent received goods valued in excess of \$50,000 transported to its place of business in interstate commerce directly from States other than the Commonwealth of Massachusetts.

The Respondent is and has been, at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

Local 372, Retail Clerks International Association, AFL-CIO, is and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE UNFAIR LABOR PRACTICES

The unit described in footnote 2, *supra*, is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

On December 13, 1965, a majority of employees in the above-mentioned unit, by a secret-ballot election conducted under the supervision of the Regional Director of the National Labor Relations Board, designated and selected the Union as their representative for the purposes of collective bargaining with Respondent and on April 6, 1966, the Union was certified as the exclusive bargaining representative of the employees in the said unit, within the meaning of Section 9(a) of the Act.

On April 18, 1966, the Union, by its letter directed to the executive vice president of Respondent, requested the Respondent to bargain. Since on or about April 26, 1966, the Respondent has failed to recognize and bargain collectively with the Union, notwithstanding its certification and request to bargain.

By its action aforesaid the Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, refused to bargain collectively with the Union, and engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (5) and 2(6) and (7) of the Act.

#### RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the record before me I recommend that the Respondent, A. G. Pollard Company, its officers, agents, successors, and assigns, shall:

1 Cease and desist from:

(a) Refusing to bargain collectively with Local 372, Retail Clerks International Association, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit.

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

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Bargain collectively with Local 372, Retail Clerks International Association, AFL-CIO, as the exclusive representative of the employees in the appropriate unit as above found, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Lowell, Massachusetts, store, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of said notice to be furnished by the Regional Director for Region 1, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt, and be maintained by it for at least 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 said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director, in writing, within 20 days from the date of the receipt of this Trial Examiner's Decision, what steps the Respondent has taken to comply herewith.<sup>6</sup>

<sup>5</sup> 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."

<sup>6</sup> In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 1, in writing, within 10 days from the date of receipt of this Order, what steps the Company 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 bargain collectively with Local 372, Retail Clerks International Association, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time selling and nonselling employees at our Lowell, Massachusetts, retail store, including cash auditors, commis-

son personnel in the Ladies Ready-to-Wear Department, Cosmetic Department employees and watchmen/maintenance employees, but excluding part-time employees working less than 15 hours per week, leased department employees, commission personnel in the Furniture, Rugs, Fur Appliance, Menswear, and Interior Decorating Departments, employees of the Old Homestead House, Bedford, Massachusetts, confidential secretaries, professional employees, guards, supervisory trainees, department heads, assistant buyers, assistant buyer trainees, buyers, and all other supervisors as defined in Section 2(11) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL bargain collectively with the aforesaid labor organization as the exclusive representative of the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

A. G. POLLARD COMPANY,  
*Employer.*

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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**Bartenders & Culinary Workers Union, Local No. 595, Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO and Arne Falk, Inc. Case 20-CC-552. December 2, 1966**

### DECISION AND ORDER

On July 19, 1966, Trial Examiner Arthur Christopher, Jr., issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter Respondent filed exceptions to the Decision and a supporting brief, and the General Counsel filed cross-exceptions and a 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 Jenkins and Zagoria].

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 briefs, and the entire record