White Front Stores, Inc. *and* Los Angeles Joint Executive Board of Hotel and Restaurant Employees and Bartenders Unions, AFL–CIO[1] *and* Retail Clerks Union, Local 770[2] Party to the Contract. Case 31–CA–315 (formerly 21–CA–6897)

June 28, 1967

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS BROWN AND ZAGORIA

On March 20, 1967, Trial Examiner Wallace E. Royster issued his Decision in the above-entitled case, 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, the Clerks, and General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs; the Joint Board filed cross-exceptions and a brief in support thereof; the Respondent and Clerks filed separate answering briefs to the General Counsel's exceptions and brief; and Respondent filed an answering brief to the Joint Board and cross-exceptions to the Trial Examiner's Decision and a brief in support thereof.

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.

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 of the parties, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following observations:

We agree with the Trial Examiner that the Respondent violated Section 8(a)(5) of the Act in refusing to recognize and deal with the Joint Board as the representative of the snackbar employees. It is clear that from March 1, 1965, when the Respondent took over the snackbar from Bab-Rand and operated the snackbar itself as a part of its retail department store, the snackbar continued to provide the same products and services, at the same location, and with the same work force doing the same job under the same immediate supervision and using the same equipment and methods. The duties of these snackbar employees always have differed from those of Respondent's other employees, and only 3 months before transferring to Respondent's payroll they had chosen the Joint Board as their statutory bargaining agent in an election conducted by this Agency. As the record thus clearly establishes that the Respondent took over a cohesive, identifiable group of employees who continued to function as a separate group and who have been separately represented by a Board-certified representative, we find that the Respondent was obligated to bargain with such chosen representative and that its failure to do so was a violation of Section 8(a)(5) of the Act. In these circumstances, we find it unnecessary to consider, and do not pass upon or adopt, the Trial Examiner's conclusion that the Respondent is not engaged in the same employing industry as Bab-Rand.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, White Front Stores, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

[1] Hereinafter also referred to as Joint Board.
[2] Hereinafter also referred to as Clerks

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

WALLACE E. ROYSTER, Trial Examiner: This matter was tried in Los Angeles, California, on September 26 and 27, 1966. The complaint alleges that White Front Stores, Inc., herein the Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, herein the Act, by entering into a collective-bargaining agreement with Retail Clerks Union, Local 770, herein the Clerks, covering Respondent's employees and containing a union-shop clause at a time when Los Angeles Joint Executive Board of Hotel and Restuarant Employees and Bartenders Unions, AFL–CIO, herein the Joint Board, was the certified representative of the employees in the bargaining unit.

The Respondent and the Clerks, in their respective answers, admit that they entered into a bargaining relationship in respect to the employees comprising the allegedly appropriate bargaining unit but deny the conclusion that unfair labor practices have been committed. All parties have filed briefs.[1]

From my observation of the witnesses,[2] in consideration of the briefs filed, and upon the entire record in the case, I make the following:

[1] The posthearing motion to correct the transcript is granted
[2] There is no substantial dispute on the facts. Credibility is not involved.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a California corporation operating a number of discount department stores at various locations in the State of California. The Respondent has an annual gross volume of sales exceeding $500,000 and annually purchases and receives goods and products valued at more than $50,000 from points located outside the State of California. I find, as is conceded, that the Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The Joint Board and the Clerks are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Only Respondent's store located on Jefferson Boulevard in Los Angeles is involved.

Effective July 1, 1962, the Respondent and the Clerks entered into a collective-bargaining agreement for a period of 5 years covering "all retail store employees and office clerical employees whose work is related to the operation of the retail stores (including, subject to the provisions of section E hereof, employees of lessees, licensees and concessionaires) employed in the retail stores and offices of the employer located within the present geographic jurisdiction of the Union," with usual exclusions. The agreement provides further that should the Respondent acquire an additional store or department within the Clerks' geographic jurisdiction, the agreement would be applied to the employees in this acquisition. In November 1962, the Jefferson store opened. At about the time of opening, Bab-Rand Company, herein called Bab-Rand, was licensed by the Respondent to operate a snackbar at the Jefferson store. In 1964, upon appropriate petitions, the Board after hearing decided that the snackbar workers at the Jefferson store constituted an appropriate bargaining unit; that they were employed by Bab-Rand alone and not by Bab-Rand and the Respondent jointly, and directed an election.[3] In November 1964, the Board certified the Joint Board as the exclusive bargaining representative of Bab-Rand snackbar workers at the Jefferson store.[4] Thereafter, Bab-Rand and the Joint Board executed a collective-bargaining agreement covering these employees.

On February 28, 1965, Bab-Rand ceased its snackbar operation in the Jefferson store and at other locations where it had similar snackbars in Respondent's stores. Effective March 1, all of the snackbar employees at the Jefferson store were transferred to Respondent's payroll and since have remained direct employees of Respondent. On March 30, the Clerks wrote to the Respondent suggesting a wage scale schedule for snackbar employees at the Jefferson store. This was accepted and made effective as of March 1.

On June 23, the Respondent wrote to the Clerks in connection with the snackbar employees, stating its belief that such employees were properly within the coverage of the 1962 contract but that union-security provisions would not be made effective until there was an authoritative determination as to the propriety of this action.[5] The Clerks accepted this understanding.

On June 14, the Joint Board wrote the Respondent renewing an earlier oral demand that it be recognized as the lawful representative of the snackbar employees and asking for a meeting. The Respondent refused to meet with or deal with the Joint Board claiming that its obligation under its contract was to deal only with the Clerks in all bargaining matters affecting the snackbar employees.

The snackbar employees have continued to work much as they did before and with the same or similar equipment. The snackbar supervisor, Levi Montgomery, remains on his job but no longer has authority to hire or discharge. This power is now exercised by Respondent's store manager, or one of his assistants, and the snackbar operation is now conducted by the Respondent as another department in its store. One snackbar employee, at his request, has been transferred to another department. On some occasions some snackbar workers have been required to do odd tasks not before given to them; sweeping floors outside the snackbar area and bringing in shopping carts from the parking lot. There is no difference in the character or extent of control exercised by the Respondent over snackbar employees in comparison with that over employees in other store departments.

When it decided in June 1964 that the snackbar employees constituted an appropriate bargaining unit, the criteria relied upon by the Board were that they were employees of Bab-Rand and were the only Bab-Rand employees in the store. Once the finding of employment relationship was made and its reach defined, it followed that the snackbar employees were entitled to choose a representative to bargain with that employer. Their choice of the Joint Board resulted in a certification which Bab-Rand was obliged to honor, absent unusual circumstances, for at least a year. With the certification little more than 3 months old, Bab-Rand left the scene and Respondent became the employer. The central argument supporting the complaint is that the Respondent is the "successor" to Bab-Rand, that there was a continuation of the "employing industry," and that under well-settled Board and court decisions the Respondent must accept the unit determination and bargain with the Joint Board.

The Respondent and the Clerks cannot now relitigate the 1964 representation case and have not attempted to do so. They argue, however, that the Respondent is not a "successor" to the business of Bab-Rand as that term has been given meaning in Board decisions and that in any event it cannot be demonstrated that the Respondent is the same "employing industry" as Bab-Rand.

In August 1965, the Board had before it a representation case involving a question of successorship with the Respondent as one of the parties. In its decision[6] the Board found that an entity named Bristlo had been licensed to operate liquor departments in seven of

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[3] 147 NLRB 247

[4] The Board found the appropriate unit to consist of: "All snackbar waiters and waitresses, cooks, and dishwashers . . excluding all other employees, guards, and supervisors as defined in the Act."

[5] This may reflect an afterthought on the part of the Respondent. Employee Annie Valliant testified that Sam Israel, the store manager, told her in May that the snackbar employees were required to join the Clerks. Ron Mitton, another employee, testified that Valliant passed on this directive to him. Both acted upon it. Israel made no mention of this matter in his testimony. I find that Valliant and Mitton joined the Clerks in the belief that to do so was a condition of employment.

[6] *Triumph Sales, Inc.*, 154 NLRB 916, 918

Respondent's stores and had entered into collective-bargaining contracts with the Clerks and with sister locals of the Clerks covering employees in some if not all these departments. Bristlo became bankrupt and another entrepreneur, Triumph, purchased merchandise, equipment and State liquor licenses from Bristlo through the receiver in bankruptcy and, after executing license agreements with the Respondent, operated 11 liquor departments in as many of its stores. Included in the 11 were the 7 earlier operated by Bristlo. Bristlo had 7 employees but only 3 of these came over to Triumph and the latter hired 17 additional workers. Triumph also added a line of gourmet foods not previously handled by Bristlo. On the basis of these factors the Board concluded that the "employing industry," Triumph, was not "essentially the same" and that Triumph was not Bristlo's successor. The contracts running between Bristlo and various locals of the Retail Clerks, although unexpired, were held not to constitute bars to elections.

Guided by this decision and considering that the Respondent is in the business of operating discount department stores offering a wide range of merchandise to the public in which snackbars play an inconsiderable part, I conclude that the Respondent is not the same "employing industry" as Bab-Rand and thus is not a successor to Bab-Rand.

This finding, however, is only a step on the journey to disposition of this case. The Respondent, even though it is not Bab-Rand's successor, may still have been obliged to recognize the Joint Board and still faces the complaint that it unlawfully extended recognition to and contracted with the Clerks. The law does not frown upon the employer who accepts a union's claim that it is the bargaining representative of his employees unless elements are present to indicate that recognition represents the fruition of the desires of the employer and the union rather than that of the employees affected. One need not speculate about the preferences of the Respondent and the Clerks. Both contended even when Bab-Rand was the employer that the snackbar employees came under the Clerks' contract and, once Bab-Rand disappeared, the claim of the Clerks to be the bargaining representative of the newly acquired employees was quickly honored. I think there is no greater reason to speculate about the desires of the employees. They had voted in November 1964 for representation by the Joint Board. There is nothing in the record to indicate that by the following March they had changed allegiance.

Perhaps the Respondent should have invoked the Board's processes to resolve the matter. If it was then decided that despite the change of employers the snackbar employees still constituted an appropriate bargaining unit, recognition of the Clerks would clearly have been unlawful. No labor organization other than the Joint Board could convincingly have claimed then to have been the employees' choice. The Respondent argues, in substance, on this aspect of the case that this question can be resolved as well in an unfair labor practice proceeding as in a representation case. The fact that this can be and will be done, does not, however, absolve the Respondent from the consequences of its action.

Decision must turn, as I view it, on the question of whether the snackbar employees still constituted an appropriate bargaining unit after they were placed on Respondent's payroll. The decision of the Board in the representation case does not dispel doubt. The only reason articulated there to support the unit determination was that it included all of the employees of Bab-Rand at the store. If other considerations had play they are not mentioned. But other factors deserving of some weight suggest themselves. The Respondent saw fit to arrange for the operation of snackbars in its stores by licensees and continued this arrangement until Bab-Rand was no longer able to perform. Snackbars are distinct from other departments in the store in that they provide a service rather than merchandise. It seems probable that shoppers patronize the snackbar because it is convenient to do so during a shopping interlude and that its primary function is to permit a hungry customer to satisfy his want while keeping him in the store. One snackbar employee was permanently transferred to another department but there is no practice of interchange. Snackbar employees are snackbar employees and that is where they work. Finally, the Board has held, implicitly but in my view clearly, that snackbar workers consitute an appropriate bargaining unit even in the circumstances where they are carried on the same payroll as other employees in a store. That is one of the teachings of the *Boy's Markets, Inc.*, 156 NLRB 105, enfd. 370 F.2d 205 (C.A. 9).

I conclude that the snackbar employees at the Jefferson store continued on and after March 1, 1965, to constitute a unit appropriate for purposes of collective bargaining.

At no time before the Respondent entered into its agreement with the Clerks bringing the snackbar employees under the coverage of the general contract had any such employee designated the Clerks to represent him. There is no evidence that the Clerks sought such an expression from the employees. It was content to attain bargaining status through the willingness of the Respondent to accord it to them. The Joint Board alone has been designated by the snackbar employees to bargain for them. The Respondent must give effect to that designation.

I find that on March 1, 1965, the Joint Board was the exclusive bargaining representative of Respondent's snackbar employees at the Jefferson store and that by refusing at all times to recognize and bargain with that representative, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

By extending recognition to and by entering into a contract with the Clerks affecting the wages, hours, working conditions, and other conditions of employment of snackbar employees at the Jefferson store, the Respondent has given assistance and support to the Clerks and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(2) of the Act.

By entering into a union-security agreement with the Clerks which by its terms required snackbar employees to obtain and maintain membership in the Clerks, the Respondent has imposed an unlawful condition of employment and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

By the commission of the unfair labor practices set forth above, the Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section

III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and such of them as have been found to constitute unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

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

As the Clerks are not and have not been the bargaining representative of the snackbar employees, the recognition extended to the Clerks must be withdrawn and the contract with the Clerks no longer be given effect. To the extent that snackbar employees have by reason of recognition of the Clerks and because of the contract with the Clerks been required to or have been told in circumstances inducing belief of a requirement to obtain membership in the Clerks or to pay any sums to the Clerks as an actual or supposed condition of employment, the Respondent must reimburse such individuals by paying to them all of such sums together with interest at the rate of 6 percent per annum computed quarterly.[7]

Upon request, the Respondent must bargain with the Joint Board as the exclusive representative of the snackbar employees at the Jefferson store. The contract between Bab-Rand and the Joint Board, upon notice, is terminable on March 15, 1967, before this Decision will be in the hands of the parties. Arguably, at least Respondent in effect gave such notice of termination by refusing to concede that it was bound to the Joint Board by this contract. There seems now to be little point in deciding whether the Respondent at all times since it began the snackbar operation on March 1, 1965, was required to give effect to the Joint Board contract. It then became the employer of a group of employees who had a bargaining representative. It could not lawfully change the substantive conditions of their wages, hours, working conditions, and other conditions of employment without going through the bargaining process to agreement or impasse. As it refused to bargain, it follows that any change in such matters made in respect to the snackbar workers must at the request of the Joint Board be rescinded and that any monetary loss suffered by the employees on that account be returned to them with interest at the rate of 6 percent per annum.

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

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Joint Board and the Clerks are labor organizations within the meaning of Section 2(5) of the Act.
3. On March 1, 1965, and at all times since, the Joint Board has been and is the exclusive bargaining representative of all snackbar waiters and waitresses, cooks, and dishwashers employed at the Jefferson store, excluding all other employees, guards, and supervisors as defined in the Act; a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. By refusing at all times since March 1, 1965, to recognize the Joint Board as such bargaining representative and by refusing to bargain with the Joint Board in respect to the wages, hours, working conditions, and other conditions of employment of snackbar employees at the Jefferson store, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
5. By recognizing the Clerks as bargaining representative of the snackbar employees at the Jefferson store and by entering into a contract with the Clerks affecting such employees, the Respondent has contributed support and assistance to the Clerks and has thus engaged in unfair labor practices within the meaning of Section 8(a)(2) of the Act.
6. By contracting with the Clerks to require membership in the Clerks as a condition of employment, the Respondent has discriminated in regard to tenure of employment to encourage membership in the Clerks and has thus engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
7. By contributing support and assistance to the Clerks, by refusing to bargain with the Joint Board, by conditioning employment upon membership in the Clerks (all with respect to the snackbar employees at the Jefferson store), the Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
8. 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 foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that White Front Stores, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Assisting or contributing support to the Clerks in connection with the claim of that labor organization to represent snackbar employees at the Jefferson store.

(b) Recognizing the Clerks as bargaining representative of snackbar employees at the Jefferson store or giving effect to any contract with that labor organization affecting such employees.

(c) Refusing to bargain with the Joint Board as the exclusive representative of the snackbar employees at the Jefferson store.

(d) In any like or similar manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist the Joint Board or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent

[7] *F. W. Woolworth Company*, 90 NLRB 289, *Isis Plumbing & Heating Co., Inc.*, 138 NLRB 716.

that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

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

(a) Withdraw and withhold recognition from the Clerks as bargaining representative of snackbar employees at the Jefferson store and cease giving effect to any contract, agreement, or understanding with that labor organization relating to those employees.

(b) Reimburse the Jefferson store snackbar employees with interest for any sums paid by them to the Clerks because of the actual or asserted existence of any contractual arrangement between White Front Stores, Inc., and the Clerks.

(c) Make whole the snackbar employees at the Jefferson store with interest for any financial benefit lost to them by reason of any changes in wages, hours, working conditions, or other conditions of employment made effective on or since March 1, 1965, from the date of any such change to the date when such matters have been bargained with the Joint Board to agreement or impasse.

(d) Post at its Jefferson store copies of the attached notice marked "Appendix."[8] Copies of this notice to be furnished by the Regional Director for Region 31, Los Angeles, California, shall, after being signed by a representative of the Respondent, be posted by it immediately in conspicuous places including all places where notices to snackbar employees are customarily posted, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the date of receipt of this Decision, what steps it has taken to comply herewith.[9]

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[8] 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."

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

APPENDIX

NOTICE TO ALL SNACKBAR EMPLOYEES AT THE JEFFERSON STORE

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 you that:

WE WILL upon request bargain with Los Angeles Joint Executive Board of Hotel and Restaurant Employees and Bartenders Unions, AFL–CIO, as your exclusive bargaining representative and, if an understanding is reached, embody it in a signed agreement.

WE HEREBY withdraw recognition from Retail Clerks Union, Local 770 and will no longer give effect to any contract with that organization covering you at this store.

WE WILL reimburse you with interest for sums any of you have paid to the Retail Clerks on and since March 1, 1965, because of an actual or supposed requirement that you had to pay any money to that labor organization in order to stay in our employ.

WE WILL make all of you whole for any financial loss arising from your employment with us on and since March 1, 1965, due to our failure to recognize and bargain with Los Angeles Joint Executive Board of Hotel and Restaurant Employees and Bartenders Unions, AFL–CIO.

WE WILL NOT by imposing a bargaining representative upon you or by refusing to recognize the bargaining representative of your choice, or in any like or similar manner interfere with, restrain, or coerce you in the exercise of your right to self-organization, to form, join, or assist any labor organization, to bargain collectively through a representative of your choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as permitted by Section 8(a)(3) of the Act.

WHITE FRONT STORES, 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, 215 West Seventh Street, Los Angeles, California, Telephone 688–5850.