

Whitney Stores, Inc. and Retail Store Employees Union, Local No. 300, Retail Clerks International Association, AFL-CIO. Case 13-CA-9645

its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

September 10, 1970

TRIAL EXAMINER'S DECISION

DECISION AND ORDER

STATEMENT OF THE CASE

BY CHAIRMEN MILLER AND MEMBERS BROWN AND JENKINS

THE ISSUE

On June 8, 1970, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, granting General Counsel's motion for summary judgment, finding no merit in various contentions made by Respondent in its brief in opposition to the motion for summary judgment, and finding on the pleadings that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended. The Trial Examiner recommended that Respondent cease and desist from such unfair labor practices and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions, and a brief in support thereof, to the Trial Examiner's Decision.

CHARLES W. SCHNEIDER, Trial Examiner: The case arises on a motion of counsel for the General Counsel for summary judgment, based upon an admitted refusal by the Respondent to bargain with the certified charging Union, mainly on the ground that the unit found appropriate by the Board is inappropriate and further that the Respondent's objections to the election were erroneously overruled without hearing.

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 REPRESENTATION PROCEEDING¹

The Board has reviewed the rulings of the Trial Examiner 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, conclusions, and recommendations of the Trial Examiner.¹

Upon petition filed on July 28, 1969, under Section 9 of the National Labor Relations Act (29 U.S.C.A. 159) by Retail Store Employees' Union, Local 300, chartered by Retail Clerks International Association, AFL-CIO, herein called the Union, a hearing involving the representation of employees at one of 10 stores in the Chicago area² of Whitney Stores, Inc., herein called the Respondent, was held before a Hearing Officer of the Board on August 25, 1969. The Respondent contended that the appropriate unit should include all 10 of its Chicago stores. Thereafter, on September 30, 1969, the Regional Director of Region 13 issued his Decision and Direction of Election, in which, contrary to the Respondent's contention, he found the single store to constitute an appropriate bargaining unit and directed an election therein.

On October 2, 1969, Respondent filed with the National Labor Relations Board a request for review of the Decision and Direction of Election. Request for review was denied by direction of the Board on November 12, 1969, on the ground that the request raised "no substantial issues warranting review."

On December 11, 1969, a secret ballot election was conducted in the election unit under the supervision of the Regional Director Of the approximately 7 eligible voters 4 cast ballots for the Union, 3 against

On December 18, 1969, Respondent filed post-election objections to the election, alleging interfering conduct by the Union during the campaign and the election and, further

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent, Whitney Stores, Inc., Chicago, Illinois,

¹ Administrative or official notice is taken of the record in the representation proceeding, Case 13-RC-11919, as the term "record" is defined in Section 102.68 and 102.69(f) of the Board's rules (Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8 as amended) See *LTV Electrosystems, Inc.*, 166 NLRB 938, enf'd 388 F.2d 683 (CA 4, 1968), cert. denied 393 U.S. 843, *Golden Age Beverage Co.*, 167 NLRB No. 24, enf'd, 415 F.2d 26 (CA 5, 1969), *Intertype Co. v. NLRB*, 401 F.2d 41 (CA 4, 1968), cert. denied 393 U.S. 1049 (1969), *Follett Corp.*, 164 NLRB 378, enf'd, 397 F.2d 91 (CA 7, 1968), Sec. 9(d) of the National Labor Relations Act

² The store located at 4047 West Madison Street in Chicago

¹ We have again examined the Decision and Direction of Election in Case 13-RC-11919 and made an independent review of the record of the hearing in the representation case and conclude that the Regional Director's findings were correct

(in substance) that the eligibility list used for the election was not current. On January 28, 1970, the Regional Director issued a supplemental decision overruling the objections and certifying the Union as exclusive bargaining agent of Respondent's employees in the appropriate unit. The record does not reveal that the Respondent sought review by the Board of this decision of the Regional Director.

THE UNFAIR LABOR PRACTICE CASE

On February 24, 1970, the Union filed the instant unfair labor practice charge alleging that since the certification the Respondent had refused and continues to refuse to bargain with the Union.

On March 16, 1970, the Regional Director issued a complaint and notice of hearing, alleging that the Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing since the certification to meet and negotiate with the Union as the bargaining representative of the employees in the certified unit.

On March 24, 1970, Respondent filed its answer to the complaint in which it admitted certain allegations of the complaint and denied others. The Respondent admitted that it had refused to meet and negotiate as alleged in the complaint. In defense, the Respondent asserted that the election unit was not an appropriate bargaining unit, and further, that the Respondent's objections to the election had been improperly overruled, without affording it a hearing thereon. Consequently, the Respondent denied the commission of unfair labor practices. Respondent also denied that it is engaged in interstate commerce at the 4047 West Madison Street store.

On April 3, 1970, counsel for the General Counsel filed a motion for summary judgment, on the ground there are no genuine issues as to any material facts.

On April 7, 1970, I issued an order to show cause on the General Counsel's motion for summary judgment. On May 5, 1970, Respondent's counsel filed a brief in opposition to motion for summary judgment, which has been considered. On May 6, 1970, counsel for the Union filed their statement in support of motion for summary judgment, which has been considered.

RULING ON MOTION FOR SUMMARY JUDGMENT

Counsel for the General Counsel contends that all issues in dispute were decided by the Board in the representation case and that he is therefore entitled to summary judgment as a matter of law.

The Respondent opposes the motion for summary judgment, asserting that there are evidentiary issues. The Respondent therefore requests that a hearing be held before a Trial Examiner at which the unit determination and other issues be litigated.

More specifically the Respondent's position is that (1) it is not engaged in commerce at the West Madison Street store, (2) the Regional Director's unit determination was incorrect, and (3) the Regional Director erroneously failed to provide a hearing on the objections to the election,

despite the existence of substantial credibility issues raised by the evidence.

It is established Board policy, in the absence of newly discovered or previously unavailable evidence or special circumstances, not to permit litigation before a Trial Examiner in an unfair labor practice case of issues which were or could have been litigated in a prior related representation proceeding.³ This policy is applicable even though no formal hearing on objections has been provided by the board. Such a hearing is not a matter of right unless substantial or material issues are raised.⁴

We come now to the Respondent's contentions summarized above.

(1) *Jurisdiction*: Paragraph 2 of the complaint alleges, in sum, that the Respondent is a New York corporation selling women's ready-to-wear clothing at the 4047 West Madison Street store, that during the past calendar year the Respondent had a gross volume of business in excess of \$500,000, and that the Respondent's Illinois stores received directly from out of State clothing valued in excess of \$50,000. Paragraph 3 of the complaint alleges, in sum, that the Respondent is engaged in commerce. Respondent's answer denies that it is engaged in interstate commerce within the meaning of the Act at the 4047 West Madison Street store. It does not deny the specific allegations of paragraph 2 of the complaint.

The Respondent's contest of jurisdiction is found not to be supported.

The Board asserts jurisdiction over all retail *enterprises* which, like the Respondent's here, have a gross volume of business of at least \$500,000.⁵ In addition the Board asserts jurisdiction over all non-retail *operations* which have an annual outflow or inflow across State lines of at least \$50,000.⁶ Judged by these tests the Respondent is engaged in commerce and the Board will exert jurisdiction. Since it is the involvement of the *enterprise* which determines jurisdiction, it is not controlling that the volume of sales or out-of-State receipts of a particular segment of it may not alone meet the requirements. There is thus no issue as to jurisdiction requiring an evidential hearing.

(2) *The unit determination*: The Respondent's position as to this is that the Regional Director's finding that a single store constitutes an appropriate bargaining unit is erroneous. Furthermore, the Respondent asserts, citing *Pepsi-Cola Buffalo Bottling Co. v. N.L.R.B.*, 409 F.2d 676 (CA 2, 1969), cert. denied 396 U.S. 904, that the Respondent is entitled to agency review of the Regional Director's

³ *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, enf'd 379 F.2d 517 (CA 7, 1967), cert. denied 389 U.S. 1041 *Metropolitan Life Insurance Company*, 163 NLRB 579. See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941) NLRB Rules and Regulations, Sections 102.67(f) and 102.69(c).

⁴ *O.K. Van and Storage, Inc.*, 127 NLRB 1537, enf'd 297 F.2d 74 (CA 5, 1961). See *N.L.R.B. v. Air Control Window Products, Inc.*, 335 F.2d 245, 249 (CA 5, 1964). "If there is nothing to hear, then a hearing is a senseless and useless formality." See also *N.L.R.B. v. Bata Shoe Co.*, 377 F.2d 821, 826 (CA 4, 1967), cert. denied 389 U.S. 917. "there is no requirement, constitutional or otherwise, that there be a hearing in the absence of substantial and material issues crucial to determination of whether NLRB election results are to be accepted for purposes of certification."

⁵ *Carolina Supplies and Cement Co.*, 122 NLRB 88.

⁶ *Siemons Mailing Service*, 122 NLRB 81.

decision Assuming that this is so, the Respondent will have opportunity to request the Board for review when the matter reaches the Board. The Trial Examiner, however, is without authority to review the Board's decision in the representation case to the effect that the Employer's request for review raised no substantial or material issues. In the absence of newly discovered evidence the Board's disposition of the representation case is, at this stage of the proceeding, the law of the case and binding on the Trial Examiner.⁷

(3) *Objections to the election:* Here, too, the decision of the Regional Director is final for two reasons. (1) the ordinary rule forbidding relitigation of representation decisions in subsequent related unfair labor practice cases, and (2) the apparent failure of the Respondent to apply for review of the Regional Director's decision. Board rule 102.67(f) made applicable to postelection objections by the provisions of Board rule 102.69(c) provides, in part, that

Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding.

By failing to apply for review of the Regional Director's supplemental decision and certification of January 28, 1970, the Respondent waived its right to press in this proceeding its objections to the election in the representation proceeding. *N.L.R.B. v. Rexall Chemical Co.*, 370 F.2d 363 (C.A. 1, 1967); *N.L.R.B. v. Southbridge Sheet Metal Works*, 380 F.2d 851 (C.A. 1, 1967); *N.L.R.B. v. Thompson Transport Co., Inc.*, 406 F.2d 698 (C.A. 10, 1969).

There thus being no resolved matters requiring an evidentiary hearing, the motion of counsel for the General Counsel for summary judgment and issuance of Trial Examiner's Decision is granted.

Upon the basis of the record before me, I make the following further.

⁷ The Board has held that Trial Examiners are required to follow Board precedents until the Board or the Supreme Court overrules them. *Prudential Insurance Agents*, 199 NLRB 768, *Ranco, Inc.*, 109 NLRB 998, fn 8, *Lenz Co.*, 153 NLRB 1399 This is so, even though there may be contrary authority in the courts of appeals *Iowa Beef Packers*, 144 NLRB 615 The Board has not indicated that it has accepted the *Pepsi Cola* opinion for all future cases. In such a situation the Trial Examiner must follow the Board's precedent, namely, that a denial of review of the Regional Director's decision in a representation case precludes relitigation of any such issues in any related subsequent unfair labor practice proceeding. Rules and Regulations, NLRB, Section 102.67(f) See also *Teamsters Local 390 (U & Me Transfer)*, 119 NLRB 852, *Novak Logging Co.*, 119 NLRB 1573, *Scherrer Co.*, 119 NLRB 1587 But cf. *N.L.R.B. v. Harrah's Club*, 403 F.2d 865, 870 (C.A. 9, 1968)

The denial of certiorari in the *Pepsi Cola* case is not dispositive. Justice Frankfurter said that "such a denial carries with it no implication whatever regarding the [Supreme] Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950)

It is to be noted that the Court of Appeals for the First Circuit has declined to follow the view expressed by the Second Circuit in the *Pepsi Cola* opinion. In *N.L.R.B. v. Magnesium Casting Co.*, 427 F.2d 114 (1970), the First Circuit held that the Board is not required to review the Regional Director's determinations in a representation case in which, as here, he is exercising delegated authority to decide such cases

FINDINGS AND CONCLUSION

I. THE BUSINESS OF THE RESPONDENT

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York

At all times material herein, Respondent has maintained a retail establishment at 4047 West Madison Street, Chicago, Illinois, where it is, and has been at all times material herein, engaged in the sale of women's ready-to-wear clothing items

During the past calendar year, a representative period, the Respondent, in the course and conduct of its business operations, had a gross volume of business in excess of \$500,00, and it received at its stores in Illinois clothing items valued in excess of \$50,000, which were shipped to such stores directly from places outside the State of Illinois.

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

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act⁸

III THE UNFAIR LABOR PRACTICES

The following employees of Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and regular part-time selling and non-selling employees at the Employer's store located at 4047 West Madison Street, Chicago, Illinois, but excluding the store manager, casual employees, professional employees, porters, guards and supervisors as defined in the Act.

At all times since January 28, 1970, the Union has been the certified representative for the purpose of collective bargaining of all employees in the appropriate unit, and by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all employees in said unit for the purposes of collective bargaining.

On or about January 30, 1970, the Union requested the Respondent to bargain, and on or about February 13, 1970, the Respondent refused, and continues to refuse to bargain with the Union. The Respondent thereby engaged in unfair labor practices in violation of Section 8(a)(5) of the Act and has interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act.

⁸ Though the answer denies knowledge and information sufficient to form a belief as to this allegation of the complaint, the Respondent stipulated in the representation case that the Union is a labor organization within the meaning of the Act, and the Regional Director found the Union to be a labor organization. The Respondent did not seek review of that finding, which consequently became final and not subject to relitigation here

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

Upon the foregoing findings and conclusions, pursuant to Section 10(c) of the Act, I recommend that the Board issue the following:

ORDER

A. For the purpose of determining the duration of the certification the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union as the recognized exclusive collective-bargaining representative in the appropriate unit.⁹

B. Whitney Stores, Inc., its officers, agents, successors, and assigns shall:

1 Cease and desist from:

(a) Refusing to bargain collectively with Retail Store Employees Union, Local 300, Retail Clerks International Association, AFL-CIO, as the exclusive collective-bargaining representative of the following employees.

All regular full-time and regular part-time selling and nonselling employees at the Employer's store located at 4047 West Madison Street, Chicago, Illinois, but excluding the store manager, casual employees, professional employees, porters, guards and supervisors as defined in the Act.

(b) Interfering with the efforts of the Union to negotiate for or represent employees as collective-bargaining representative.

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

(a) Upon request, bargain collectively with Retail Store Employees Union, Local 300, Retail Clerks International Association, AFL-CIO, as the exclusive representative of all employees in the categories described above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its places of business in Chicago, Illinois, copies of the notice attached hereto marked "Appendix"¹⁰ Copies of said notice, on forms provided by the Regional Director for Region 13, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by the Respondent for a period of 60 consecu-

tive 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 for Region 13, in writing, within 20 days from date of receipt of this Decision, what steps the Respondent has taken to comply herewith.¹¹

¹¹ In the event these recommendations are adopted by the Board, this provision shall be modified to read "Notify the Regional Director for Region 13, in writing, within 10 days from date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with RETAIL STORE EMPLOYEES UNION, LOCAL NO. 300, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, as the exclusive collective-bargaining representative of all our following employees.

All regular full-time and regular part-time selling and nonselling employees at our store located at 4047 West Madison Street, Chicago, Illinois, but excluding the store manager, casual employees, professional employees, porters, guards and supervisors as defined in the Act

WE WILL NOT interfere with the efforts of the Union to negotiate for or represent employees as exclusive collective-bargaining representative.

WE WILL bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the categories listed above, and if an understanding is reached we will sign a contract with the Union

WHITNEY STORES, INC.

(Employer)

Dated By

(Representative)
(Title)

This is an official notice and must not be defaced by anyone

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.

Any questions concerning this notice or compliance with its provisions, may be directed to the Board's Office, 881 U.S. Courthouse and Federal Office Building, 219 S. Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7572.

⁹ The purpose of this provision is to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law. See *Mar-Jac Poultry Co.*, 136 NLRB 785, *Commerce Co. d/b/a Lamar Hotel*, 140 NLRB 226, 229, 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817, *Burnett Construction Co.*, 149 NLRB 1419, 1421, 350 F.2d 57 (C.A. 10, 1965).

¹⁰ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."