

Allied Stores of Ohio, Inc., and Retail Clerks International Association, Local No. 698, AFL-CIO. Case 8-CA-6043

January 15, 1971

## DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

Upon a charge filed on September 21, 1970, by Retail Clerks International Association, Local No. 698, AFL-CIO, herein called the Union, and duly served on Allied Stores of Ohio, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint on September 30, 1970, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 6, 1970, following a Board election in Case 8-RC-7156 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>1</sup> and that, commencing on or about September 17, 1970, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 12, 1970, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 27, 1970, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on November 4, 1970, the Board issued an Order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

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.

Upon the entire record in this proceeding, the Board makes the following:

### Ruling on the Motion for Summary Judgment

In its answer to the complaint, the Respondent denies the appropriateness of the unit and the validity of the underlying certification. Since the certification is based upon the election which, according to the Respondent, was not conducted according to applicable Board and legal requisites, the answer further denies the legal conclusion that it violated the Act. All other allegations of the complaint, including those concerning the request and refusal to bargain, are admitted.

In its response to the Notice To Show Cause the Respondent contends that (1) the full Board should review the unit determination made in the Decision and Direction of Election in Case 8-RC-7156 (175 NLRB No. 162) issued May 13, 1969, in the light of subsequent Board and court decisions, and of the Union's picketing after the certification of July 6, 1970; (2) oral argument before the full Board should be granted to consider the propriety of directing a second election on November 6, 1969, 5 months after the first election, without an investigation to determine whether or not the Union's misconduct, which caused the first election to be set aside, had been sufficiently dissipated to warrant conducting a second election; (3) alleged Board irregularities in connection with the holding of the second election destroyed laboratory conditions for holding a free election and therefore invalidated the certification based on that election; and (4) the Regional Director improperly made *ex parte* credibility resolutions in recommending the overruling of the Respondent's objections and the Board improperly relied thereon in adopting the Regional Director's findings and recommendations.

With respect to the Respondent's first contention, it is to be noted that, in accord with Board precedent,<sup>2</sup> more than one unit may be appropriate among employees of a particular employer and the Board's choice of a unit involves of necessity a large measure of informed judgment. We have considered the recent Board and court decisions cited by the Respondent<sup>3</sup> as well as the Union's alleged picketing aimed at organizing another store which the Respondent contends is an integral part of its total operations and we have concluded that they do not make inappropri-

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 8-RC-7156 as the term "record" is defined in Secs 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (CA 4, 1968). *Golden Age Beverage Co.*, 167 NLRB 151, *Intertype Co v Penello*, 269 F Supp 573 (DC Va., 1967), *Follett Corp.*, 164 NLRB 378, enfd 397

F 2d 91 (CA 7, 1968), Sec. 9(d) of the NLRB

<sup>2</sup> *Haag Drug Company, Incorporated*, 169 NLRB No 111

<sup>3</sup> *U-Tote-Em Grocery Company*, 185 NLRB No 6; *N.L.R.B. v. Pinkerton, Incorporated*, 428 F.2d 479 (CA 6), and *Local 1325, Retail Clerks [Adams Drug Co., Incorporated]*, v *N.L.R.B.* 414 F.2d 1194 (CA DC)

ate the single store unit heretofore found appropriate in Case 8-RC-7156. Accordingly, we reaffirm our prior unit determination.

The Respondent's second contention dealing with the propriety of conducting the second election without first investigating the effects of the conduct causing the first election to be set aside was also raised in the Respondent's objections. In his Report on Objections dated February 8, 1970, the Regional Director treated with this contention and concluded that the Union's conduct prior to the first election need not be considered. Nevertheless, the Regional Director also specifically found, on the basis of his investigation, that during the 5 months' lapse between the first and second elections, the effects of the Union's misconduct prior to the first election had been dissipated before the second election. He further finds that the Union's organizational activities after the first election did not warrant setting the election aside. The Respondent again raised this question before the Board in its exceptions to the Regional Director's report. The Board considered this matter in its Second Supplemental Decision and Certification of Representative issued July 6, 1970, in which it adopted the Regional Director's findings and recommendations and certified the Union. In these circumstances this contention of the Respondent is without merit, and the Board denies the request for oral argument before the full Board.

As to the alleged irregularities in connection with the holding of the second election, this issue too was raised in the Respondent's objections. The Respondent's contention is based upon the Regional Director's postponing action indefinitely in the second election after the Respondent filed the unfair labor practice charge against the Union in Case 8-CB-1433 and, 4 days later, his rescheduling the election with direction that the ballots be impounded pending disposition of the unfair labor practice charge. In his report, the Regional Director treated specifically with this contention and overruled the objections based thereon. As indicated above, the Board in its Second Supplemental Decision adopted the Regional Director's findings and recommendations overruling the objections. We reaffirm that Decision.

Finally, the Respondent contends that the Board improperly overruled Objections 1, 2, and 4 related to the Union's conduct prior to the second election because of the Regional Director's alleged *ex parte* credibility resolutions which entailed rejection of conflicting testimony of Respondent's supervisory employees. The Board also considered this matter in its Second Supplemental Decision. It specifically found it unnecessary to resolve the credibility of the

evidence presented to the Regional Director concerning Objections 1, 2, and 4 as the Respondent presented no evidence of harassment or intimidation, or of derogatory statements concerning a supervisory or managerial personnel. Since the Respondent thus failed to establish a *prima facie* case, there was no need to resolve credibility issues, and no issue in this connection which would require a hearing.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>4</sup>

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF THE RESPONDENT

Respondent, an Ohio corporation, with principal office and place of business at Akron, Ohio, is, and has been at all material times herein, engaged in the operation of five retail department stores, included among which is a store located at 225 South Main Street, Akron, Ohio, and known as "Polsky's." Annually, the Respondent sells and distributes from "Polsky's" products whose gross value exceeds \$500,000. Annually, the Respondent receives goods valued in excess of \$50,000 directly from outside the State of Ohio.

We find, on the basis of the foregoing, that Respondent is, 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, and that it will effectuate the policies of the Act to assert jurisdiction herein.

### II. THE LABOR ORGANIZATION INVOLVED

Retail Clerks International Association, Local No.

<sup>4</sup> See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941), Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

698, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

### III. UNFAIR LABOR PRACTICES

#### A. *The Representation Proceeding*

##### 1. The unit

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

All regular selling and nonselling employees of the Employer's Akron, Ohio, store and service building, including employees of Selegman & Latz of Akron, Inc., Joseph Cirino, and Poly-Foto, and all qualified "Status three" employees, but excluding professional employees, casual employees, temporary employees, seasonal employees, guards, confidential employees, supervisors as defined in the Act and employees represented by other labor organizations.

##### 2. The certification

On November 6, 1969, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 8 designated the Union as their representative for the purpose of collective bargaining representative of the employees in said unit on July 6, 1970, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

#### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 8, 1970, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 17, 1970, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since September 17, 1970, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order 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, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

### CONCLUSIONS OF LAW

1. Allied Stores of Ohio, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Clerks International Association, Local No. 698, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All regular selling and nonselling employees of the Employer's Akron, Ohio, store and service building, including employees of Selegman & Latz of Akron, Inc., Joseph Cirino, and Poly-Foto, and all qualified "Status three" employees, but excluding professional employees, casual employees, temporary employees, seasonal employees, guards, confidential employees, supervisors as defined by the Act, and employees represented by other labor organizations constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 6, 1970, the above-named labor

organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 17, 1970, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Allied Stores of Ohio, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment, with Retail Clerks International Association, Local No. 698, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All regular selling and nonselling employees of the Employer's Akron, Ohio, store and service building, including employees of Selegman & Latz of Akron, Inc., Joseph Cirino, and Poly-Foto, and all qualified "Status three" employees, but excluding professional employees, casual employees, temporary employees, seasonal employees, guards, confidential employees, supervisors as defined by the Act, and employees represented by other labor organizations.

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

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms

and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Akron, Ohio, store copies of the attached notice marked "Appendix."<sup>5</sup> Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>5</sup> In the event that this 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."

#### 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 concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Clerks International Association, Local No. 698, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

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

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All regular selling and nonselling employees of the Employer's Akron, Ohio, store and service building, including employees of Selegman & Latz of Akron, Inc., Joseph Cirino, and Poly-Foto, and all qualified "Status three" employees, but excluding professional employees, casual employees, temporary employees, seasonal employees, guards, confidential employees, supervisors

as defined by the Act, and employees represented by other labor organizations.

ALLIED STORES OF OHIO,  
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, 1695 Federal Office Building, 1240 East Ninth Street, Cleveland, Ohio 44199, Telephone 216-522-3715.