

**Titche-Goettinger Company and Retail, Wholesale and Department Store Union, AFL-CIO. Case 16-CA-3454**

May 14, 1969

**DECISION AND ORDER**

BY CHAIRMAN McCULLOCH AND MEMBERS  
FANNING AND ZAGORIA

On January 14, 1969, Trial Examiner Ivar H. Peterson issued his Decision in the above-entitled proceeding, granting the General Counsel's Motion for Judgment on the Pleadings, and 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. The Trial Examiner recommended that the Respondent cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the 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.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.<sup>1</sup>

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Titche-Goettinger Company, Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

<sup>1</sup>In adopting the Trial Examiner's recommendations, we note that the correct tally of the election conducted on April 24, 1968, was that of approximately 107 eligible voters, 100 cast ballots of which 49 were for, and 46 against the Petitioner, with 3 void and 2 challenged ballots.

**TRIAL EXAMINER'S DECISION**

**STATEMENT OF THE CASE**

**The Representation Proceeding<sup>1</sup>**

IVAR H. PETERSON, Trial Examiner: Upon petition filed under Section 9(c) of the National Labor Relations Act (29 U.S.C.A. 159 (c)) on March 2, 1968, by Retail,

Wholesale and Department Store Union, AFL-CIO, herein called the Union, a hearing was held by the Acting Regional Director for Region 16 of the Board who subsequently issued a Decision and Direction of Election in an appropriate bargaining unit, described hereinafter, of the employees of Titche-Goettinger Company, Dallas, Texas, herein called the Respondent.

Pursuant to the Decision and Direction of Election, an election by secret ballot was conducted on April 24, 1968,<sup>2</sup> under the supervision and direction of the Regional Director. Immediately following the election the parties were served with copies of the Tally of Ballots which showed that of approximately 107 eligible voters, 97 cast ballots, of which 49 were for, and 38 were against the Union, with 3 void and 2 challenged ballots. On May 1, the Respondent filed timely objections to conduct affecting the results of the election, alleging: (1) that the void ballots should have been considered as votes against the Union, (2) that the Board agent rushed people through the voting procedure and refused to answer any questions about the procedure, (3) that the Union observer, Clemmie Lewis, "took charge" of the conduct of the election, (4) that the union observers were allowed to tell the voters that they were not eligible to vote, rather than merely challenging their vote, (5) that an active and militant union supporter, L. B. Harris, was permitted to coerce and intimidate voters by his presence, and (6) that the total conduct of the election resulted in confusion in the minds of the voters. The Respondent submitted affidavits of employees to support these contentions.

On August 6, the Acting Regional Director issued a Supplemental Decision and Certification of Representation in which he stated that he had conducted an investigation of the challenges and objections, found that the objections raised no substantial or material issues with respect to the election, overruled the objections and certified the Union as the representative of the employees in the appropriate unit. As to the challenged ballots the Acting Regional Director stated that they were not sufficient in number to affect the results of the election. On August 16, Respondent filed a timely appeal with the Board from the Acting Regional Director's Supplemental Decision and Certification of representative. No requests for review was filed with respect to the Acting Regional Director's rulings on the challenges.

On September 19, the Board issued an order denying the Respondent's request for review of the Regional Director's Supplemental Decision and Certification of Representative, on the ground that it raised no substantial issues warranting review.

**The Complaint Case**

On October 16, the Union filed the unfair labor practice charge in the instant case in which it alleged that since August 6, 1968, and continuing to date, the Union has requested the Respondent to bargain collectively, which the Respondent has refused to do.

<sup>1</sup>Official notice is taken of the record in the representation proceeding, Case 16-RC-4566, as the term "record" is defined in Sec. 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 No. 81, enfd. 388 F.2d 683 (C.A. 4); *Golden Age Beverage Co.*, 167 NLRB No. 24; *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va. 1967); *Follett Corp.*, 164 NLRB No. 47, enfd. 397 F.2d 91 (C.A. 7); Sec. 9(b) of the NLRA.

<sup>2</sup>Unless otherwise indicated, all dates refer to the year 1968.

On November 14, the General Counsel, by the Regional Director of Region 16, issued a complaint and notice of hearing alleging that 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 to bargain with the Union upon request. On November 20, 1968, Respondent filed its answer to the complaint in which certain allegations of the complaint were admitted and others denied. On November 29, the Respondent amended its answer to deny paragraph 14(b) of the complaint.<sup>3</sup>

In its answer and amended answer the Respondent admits the following allegations of the complaint: (1) the filing of service of the charge, (2) certain jurisdictional facts, (3) that the Union is a labor organization within the meaning of Section 2(5) of the Act, (4) that an election was held, (5) that the Union has requested the Respondent to bargain collectively, and (6) that the Respondent has refused and continues to refuse to bargain. Respondent denied the allegations contained in the complaint to the effect that: (1) the Union has been and is now the exclusive representative for the purposes of collective bargaining of a majority of the employees in the unit, and (2) that by refusing to bargain in connection with the other allegations described, the Respondent did engage in and is engaging in unfair labor practices affecting commerce within the meaning of the Act.

Under date of November 26, received November 29, counsel for General Counsel filed a Motion for Judgment on the Pleadings in which he contends that the pleadings, considered together with the official Board record in the underlying representation, proceeding Case 16-RC-4566, raise no issues requiring a hearing; that Respondent's defense set forth in its answer raises no litigable questions of fact; and that, as a matter of law Respondent has no valid defense to the complaint.

On December 3, Trial Examiner Charles Schneider issued an Order directing the parties to show cause, on or before December 17, as to whether or not General Counsel's motion should be granted. On December 16, counsel for Respondent filed an opposition to General Counsel's Motion for Judgment on the Pleadings. On December 19, General Counsel filed a reply to the Respondent's opposition. No other responses have been received.

#### Rulings on Motion for Judgment on the Pleadings

In its opposition to the motion for judgment on the pleadings Respondent urges that General Counsel's motion should be denied for a number of reasons which in summary are as follows: (1) the representation matters were not litigated, but were determined in an *ex parte* proceeding wherein Respondent had no opportunity to cross-examine witnesses presented by the charging party and the Regional Director, (2) the refusal to allow him to cross-examine witnesses and to introduce evidence constitutes a denial of due process, (3) that unless he is allowed to litigate the representation question, the Respondent would not have a final determination for purposes of judicial review, and (4) a full hearing and report by a Trial Examiner is required.

I find the Respondent's contention unsubstantiated.

The questions of the validity of the election and certification were decided by the Board in the representation proceeding. 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 the prior related representation proceedings.<sup>4</sup> Respondent's objections to the certification constitute an attempt to relitigate the Board's determination and therefore must fall unless supported by new evidence or special circumstances.

There is no absolute right to a hearing under Section 10(b) of the Act if there are no litigable issues. See *Harry Campbell Sons' Corporation* 164 NLRB No. 36, fn. 9, and cases there cited.<sup>5</sup> The statutory and procedural language cited by Respondent do not hold to the contrary. As the court of appeals said in the case of *Air Control Window Products of St. Petersburg, Inc.*, 335 F.2d 245, 249 (C.A. 5): "If there is nothing to hear, then a hearing is a senseless and useless formality."

The Trial Examiner has no authority to review the Board's final disposition of the representation proceeding or to question its conclusion based on the existing record. However, the Board's findings are not *res judicata*. The Respondent is free, in exceptions to this Decision, to request the Board to reconsider the determinations in the representation case and, in the event of an unfavorable final order by the Board, Respondent may request review of those determinations in an appropriate court of appeals. At this stage of the proceedings, however, absent newly discovered or previously unavailable evidence, or special circumstances, the Board's disposition of the representation matters is the law of the case and binding on the Trial Examiner. No newly discovered or previously unavailable evidence is offered by Respondent, or special circumstances alleged.

Respondent's contention, that the fact that the representation matter cannot be litigated before a court of appeals absent a determination of the unfair labor practices, means that Congress obviously intended that full litigation should occur at the unfair labor practice level, is without merit. The Respondent in no way supports this claim absent his own visceral reaction.

There being no unresolved issues requiring an evidential hearing on newly discovered or previously unavailable evidence or special circumstances, the certification of the Board constitutes the law of the case at this stage of the proceeding and is binding on the Trial Examiner. The Motion for Summary Judgment is therefore granted. I hereby make the following further:

<sup>4</sup>*Howard Johnson Company*, 164 NLRB No. 121; *Metropolitan Life Insurance Company*, 163 NLRB No. 71; See *Pittsburgh Plate Glass Company v. N.L.R.B.*, 313 U.S. 146, 162; *N.L.R.B. v. Zetrich Company*, 344 F.2d 1011 (C.A. 5); *N.L.R.B. v. O. K. Van and Storage, Inc.*, 297 F.2d 74 (C.A. 5); Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8, as amended, Sec. 102.67(f) and 102.69(c).

<sup>5</sup>See also the following cases in which the use of summary judgment procedure where no litigable issues appeared has been enforced by the Courts: *Baumritter Corp.*, 386 F.2d 117 (C.A. 1); *Puritan Sportswear Corp.*, 385 F.2d 142 (C.A. 3); *LTV Electrosystems, Inc.*, 388 F.2d 683 (C.A. 4); *Aerovox Corp.*, 390 F.2d 653 (C.A. 4); *Neuhoff Bros. Packers, Inc.*, 362 F.2d 611 (C.A. 5); *Tennessee Packers, Inc.*, 379 F.2d 172 (C.A. 6); *Follett Corp.*, 397 F.2d 91 (C.A. 7); *Krieger-Ragsdale & Company, Inc.*, 379 F.2d 517 (C.A. 7); *E. Z. Davies Chevrolet* 395 F.2d 191 (C.A. 9).

<sup>3</sup>On December 5, the General Counsel filed an amended complaint in which he deleted par. 14(b) of the complaint. In view of this fact, I give no consideration to Respondent's claim of an issue raised by that paragraph.

## FINDINGS AND CONCLUSIONS

## I THE BUSINESS OF THE RESPONDENT

Titche-Goettinger Company, the 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 Texas, maintaining its principal office and places of business in Dallas, Texas, where it is engaged in the business of retail merchandising.

The Respondent, during the last 12 months, in the course and conduct of its business operations, sold and distributed products, the gross value of which exceeded \$500,000. During this same period of time, Respondent received goods valued in excess of \$50,000 which were transported to its Dallas, Texas, places of business directly from States of the United States other than the State of Texas.

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

## III. THE UNFAIR LABOR PRACTICES

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

All food handling employees of the employer at its downtown and North Park stores, Dallas, Texas, including regular part-time employees, hostesses, cashiers, and food inventory clerks, exclusive of all other employees, office clerical employees, guards, watchmen, executives, department managers, and supervisors as defined in the Act.

On April 24, a majority of Respondent's employees in the said unit designated and selected the Union as their collective-bargaining representative in a secret ballot election conducted under the supervision of the Regional Director of Region 16 of the National Labor Relations Board.

On August 6, the Acting Regional Director certified the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit. Respondent's request that the Board review the Acting Regional Director's certification was denied on September 19.

At all times since August 6, and continuing to the present time, the Union has been the representative for the purpose of collective bargaining of the employees in the said 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 purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Commencing on August 6, and at all times thereafter, the Respondent did refuse and continues to refuse to bargain collectively with the Union as the exclusive collective-bargaining representative of all the employees in the above unit.

By thus refusing to bargain collectively the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) of the Act, and has interfered with,

restrained and coerced its employees in violation of Section 8(a)(1) of the Act.

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 and entire record in the case I recommend that the Board issue the following order:

## 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 bargaining representative in the appropriate unit.<sup>6</sup>

B. Titche-Goettinger Company, Dallas, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

All food handling employees of the employer at its downtown and North Park stores, Dallas, Texas, including regular part-time employees, hostesses, cashiers, and food inventory clerks, exclusive of all other employees, office clerical employees, guards, watchmen, executives, department managers, and supervisors as defined in the Act.

(b) Interfering with the efforts of said Union to negotiate for or represent employees as such exclusive collective-bargaining representative, or in any like or related manner interfering with employee efforts at self-organization.

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

(a) Upon request bargain collectively with Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive representative of the employees in the appropriate unit 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 office and place of business in Dallas, Texas, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of said notice, on forms to be furnished by the Regional Director for Region 16, shall, after being duly signed by the authorized representative of the Respondent, be posted by the 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.

<sup>6</sup>The purpose of this provision is to insure 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., Inc.*, 136 NLRB 785, *Commerce Co. d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd 328 F.2d (C.A. 5), cert denied 379 U.S. 817; *Burnett Construction Co.*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

<sup>7</sup>In the event this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

(c) Notify the Regional Director for Region 16, in writing, within 20 days from receipt of this Recommended Order, what steps the Respondent has taken to comply herewith.<sup>8</sup>

<sup>8</sup>In the event these Recommendations are adopted by the Board, the provision shall be modified to read: "Notify the Regional Director for Region 16, in writing, within 10 days from receipt of this Order, what steps the Respondent 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 Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive collective-bargaining representative of all our following employees:

All food handling employees at our downtown and North Park stores, Dallas, Texas, including regular part-time employees, hostesses, cashiers, and food inventory clerks, exclusive of all other employees, and

office clerical employees, guards, watchmen, executives, department managers, 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, or in any like or related manner interfere with employee efforts at self-organization or bargaining.

WE WILL bargain collectively with the Union as exclusive collective-bargaining representative for the employees in the appropriate unit and if an understanding is reached we will sign a contract with the Union.

TITCHE-GOETTINGER  
COMPANY  
(Employer)

Dated

By

(Representative)

(Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 8A24, Federal Office Building, 819 Taylor Street, Fort Worth, Texas 76102, Telephone 817-334-2921.