

**Revco Drug Centers of the West, Inc. and Retail Clerks  
Local Union No. 99, AFL-CIO. Case 28-CA-2008**

January 25, 1971

**DECISION AND ORDER**

BY MEMBERS FANNING, BROWN, AND JENKINS

On September 18, 1970, Trial Examiner Sidney D. Goldberg issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief, to which the General Counsel filed an answering 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 of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

**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 the Respondent, Revco Drug Centers of the West, Inc., Maricopa and Pinal Counties, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.<sup>1</sup>

<sup>1</sup> In footnote 18 of the Trial Examiner's Decision, substitute "20" for "10" days.

**TRIAL EXAMINER'S DECISION**

SIDNEY D. GOLDBERG, Trial Examiner: The question for decision in this case is whether Respondent's grant of wage increases and other benefits to its employees during an organizing campaign interfered with their right to self-organization.

The complaint herein <sup>1</sup>alleges that Revco Drug Centers of

the West, Inc. (Revco or Respondent), which operates a chain of drugstores in Arizona, had interfered with employees' rights of self-organization by granting wage increases and other benefits to them after Retail Clerks Local Union No. 99, AFL-CIO (the Union), had filed representation petitions seeking elections, and that this action by Respondent constituted discrimination to cause its employees to refrain from becoming members of the Union.

Respondent answered, admitting that it had granted the wage increases and other benefits, but denying that it had done so after the filing of representation petitions and denying that its actions were to cause employees to refrain from joining the Union.

The issues so raised were tried before me at Phoenix, Arizona, on May 13 and 14, 1970. The General Counsel and Respondent were represented by counsel, afforded an opportunity to adduce evidence, cross-examine witnesses, and argue on the facts and the law. Briefs filed by the General Counsel and by counsel for Respondent have been considered.

For the reasons hereafter set forth, I find that the wage increases and other benefits conferred by Respondent upon its employees were for the purpose of impeding the organizational campaign among the employees and constituted an interference with employees' rights in violation of Section 8(a)(1) of the Act.

Upon the entire record herein <sup>2</sup> and the demeanor of the witnesses while testifying, I make the following:

**FINDINGS OF FACT**

**I. THE EMPLOYER**

The pleadings and the uncontroverted evidence show that Respondent is an Ohio corporation and a wholly owned subsidiary of Revco D. S., Inc., another Ohio corporation. Revco D. S., Inc., operates, under its own name and through Respondent and other subsidiaries, a chain of 228 retail drugstores in the States of Michigan, Ohio, West Virginia, Kentucky, North Carolina, and Arizona. Respondent operates the 38 stores in Arizona, 28 of them located in and around Phoenix and the remainder around Tucson. This Arizona chain was purchased in July 1968 from Ryan-Evans Co. which had operated the stores for 10 or more years. The answer admits that Respondent is an employer engaged in commerce and I so find.

**II THE UNION**

The answer admits, and I find, that the Union is a labor organization.

**III FACTS AND ISSUES**

**A. Summary**

The facts in this case are generally undisputed. On December 21, 1969, Respondent substantially increased the wage rates of its salesclerks and conferred other benefits upon them. It announced the changes to its Tucson employ-

<sup>1</sup> Issued February 24, 1970, on a charge filed December 24 and an amended charge filed December 31, 1969.

<sup>2</sup> The transcript of testimony has been corrected by and pursuant to an order issued August 4. Official notice is taken of the Board proceedings in Cases 28-RC-1992 and 28-RC-2000 involving Respondent as employer. While some of the papers in those cases were admitted into evidence for convenience of reference, I consider that any formal action or document in those proceedings may be considered in this case.

ees on that date and to its Phoenix employees, who are the ones involved in this case, on the 24th. At the time, the Union was engaged in an organizing campaign among the Phoenix employees and, since December 17, there had been a petition on file with the Board for a representation election among them. Upon these facts the General Counsel contends that Respondent's motive in granting the wage increases and other benefits was to interfere with the self-organizational activities of its employees; Respondent contends that the petition on file was defective, that its wage increases had been in preparation for a considerable time, and that the grant of benefits had nothing to do with the employees' self-organizational activities.

### B. Background

The Arizona chain of stores which Respondent purchased in July 1968 had been in operation for a long time and the transfer of ownership was not accompanied by any important change in the rank-and-file personnel. In October 1969 the Union sent International Representative Gary Nebeker to Phoenix to organize the drugstore employees in the area, designated as Maricopa, Pinal, and Gila Counties. After some organizing work by Nebeker and others, on November 26 the Union filed a petition requesting an election among Respondent's employees designated as "all working pharmacists in Maricopa and Gila counties" for the purpose of being certified as their bargaining representative. On December 19, 1969, the Regional Office issued a notice of hearing on the petition.<sup>3</sup>

### C. Organizational Activities Among the Clerks

According to Nebeker, his organizational efforts involved all of the employees of the several drug chains in the Phoenix area and, on his visits to Respondent's stores, he made contact with both the pharmacists and the salesclerks. He testified that he participated in the first meeting with the pharmacists in Respondent's employ on October 19, 1969, at the union hall and that, after he received inquiries from some of Respondent's salesclerks, he held a meeting of salesclerks on November 20. Immediately following his meeting with the salesclerks, Nebeker testified, he began visiting the stores, passing out leaflets to the clerks, and talking with them as they left the stores. At times, he testified, pharmacist-managers or assistant managers were present while he talked with the clerks and he specifically named Kenneth Connell of store 615, Charles Hoel of store 620, and Mike Guiterrez of store 639 as having been present at such times. During some of the organizing meetings of the pharmacists, Nebeker testified, he asked them to assist in the organization of the clerks. Nebeker further testified that he was assisted in his organizing work by his supervisor in the Retail Clerks International organization, by Joseph Zelasko, secretary-treasurer of the Union, and by Lavina M. Thelan, a salesclerk employee of Respondent.

Mrs. Thelan, since she had been employed by the chain for almost 10 years, was more specific in her testimony concerning contacts with Respondent's employees. She testified that she had called the union hall November 10, talked with Nebeker and asked him what the Revco em-

ployees would have to do "to organize the Union in the chain." Nebeker met her 2 days later and gave her authorization cards which she circulated among the women<sup>4</sup> in about 10 of Respondent's stores. She also testified that she talked with about 25 of the clerks, most of them in the stores but a few of them at home. At one of the stores, 620, she testified, both Manager Shaw and Assistant Manager Hoel were present while she talked with the clerks and at store 615, where she was employed at the time, she spoke directly with Manager Connell and Assistant Manager Martin, telling them that she was organizing the salesclerks.

On December 17 the Union executed and filed with the Board's Regional Office a petition for an election among Respondent's "selling and non-selling employees" excluding pharmacists, guards, and supervisors. The petition stated that

A substantial number of employees wish to be represented for purposes of collective bargaining by petitioner and Petitioner desires to be certified as representative of the employees.

On the same day the Union wrote a letter to Respondent, claiming that it represented "the majority" of the selling and nonselling employees in the stores in Maricopa and Pinal Counties and requesting a meeting to negotiate concerning wages, hours, and other terms and conditions of employment. This letter was admittedly received on December 18 by Mr. Louis A. Klein executive vice president of Respondent and its highest official.

Although Klein denied any prior knowledge of the organizational activity among the salesclerks of Respondent, there was no contradiction of the testimony of Nebeker and Mrs. Thelan that at least three store managers and one or two assistant managers were aware of this activity at the end of November and that Nebeker's activities included the circulation of handbills in the stores as well as direct approaches to employees as they were leaving the premises. In addition to these open activities, Mrs. Thelan testified that she talked about the Union with two employees in each of two stores, with three employees in one store, with four employees in each of three other stores, and, in a store where she was not employed at the time, with six employees. Since Respondent operated 28 stores in the area with 198 employees, the average store complement was only 7 salesclerks and, therefore, Mrs. Thelan's contacts were with a substantial part of the personnel in the 11 stores she visited.

In addition to the open character of the activities of both Nebeker and Mrs. Thelan, there was admittedly in existence at the same time an active organizational campaign among the store manager-pharmacists during which they were asked to assist in organizing the salesclerks and it is a fair inference that they were in a condition of heightened sensitivity to manifestations of employee organizational activities. The organizational campaign among the pharmacists, moreover, had been actually brought to the notice of Respondent by the filing of a petition for an election on November 26 and the Board investigation thereof, which resulted in the issuance, on December 10, of a notice of hearing.

As stated, none of the foregoing testimony was controverted by Respondent and none of the managers named was called to testify. Respondent's only evidence on this point was the testimony of Executive Vice President Klein that prior to December 18, when he received the Union's demand letter and a copy of the filed petition concerning the clerks, nobody had told him about their organizational activities and he had no knowledge of them, and the testimony of Max Bunin, vice president of the parent company in

<sup>3</sup> The hearing was held January 6 and closed January 15, 1970. In that proceeding Respondent took the position that the pharmacists and assistant pharmacists were the managerial personnel of the stores and that, therefore, they were supervisors. The Regional Director adopted that position and, in a decision dated March 20, 1970, dismissed the petition. The Union's request for review by the Board was denied June 20, 1970.

<sup>4</sup> As a general rule, Respondent's salesclerks are women and its pharmacists are men.

Cleveland and in charge of store operations in all the States, that he first heard about these activities on December 18 when Klein called to tell him about them.

On the basis of the General Counsel's evidence and the attendant circumstances set forth above, and despite the testimony of Klein and Bunin concerning their lack of personal knowledge—which I do not accept—I find that Respondent, at the beginning of December 1969, was chargeable with and had knowledge of the self-organizational activities of its sales employees.

#### D. *The Wage Increases and Other Benefits*

Mrs. Thelan, who worked for Ryan-Evans for 7 years before Respondent bought the chain in July 1968, continued to work for Respondent in the same store until about March 1970 when she was transferred to another of its stores. At the time Respondent became her employer, she testified, she was being paid the legal minimum wage, \$1.65 per hour. In the latter part of 1968, she testified, the manager of the store handed her a letter telling her that her wage rate was being raised \$.05 per hour but he told her not to "leave the letter lay around the store because it wasn't of interest to the rest of the employees." This was the only raise she received and, she testified, there were no general wage increases.

Except for Mrs. Thelan's testimony, the record is unclear concerning the wage rates of Respondent's salesclerks prior to the December 21 wage increase involved in this case. Executive Vice President Klein, called as an adverse witness by the General Counsel, testified that there was no distinction between "selling" and "non-selling" clerks, but he also testified that the maximum wage rate of nonselling clerks prior to the December increase was \$1.60 per hour while the maximum wage rate of selling clerks prior to the December increase was \$2.20 per hour. Klein also testified that, by reason of the increase granted December 21, any "non-selling" clerks who had been in the store for more than 18 months would be advanced \$.40 per hour. Although the General Counsel asked the correct questions to elicit the wage rates of Respondent's employees prior to the increase in question, Klein was evasive, his counsel was excessively obstructive and contentious, and the General Counsel failed to pursue his inquiry effectively. Comparison of Klein's testimony with the written schedule put out by Respondent showing the increase in benefits granted as of December 21, 1969, leads me to conclude that the answers he gave to questions concerning wage rates *prior* to the date were actually the rates *after* that date.<sup>5</sup> I also conclude that, with minor variations such as Mrs. Thelan's 5-cent raise at the end of 1968, the general wage rate of salesclerks in Respondent's employ was, prior to December 21, 1969, approximately the minimum wage of \$1.65 per hour. This conclusion, however, has only a limited effect in this case since the answer admits that wages were increased and benefits granted as of December 21, and the circular distributed by Respondent to its employees about that date sets forth the future wages and benefits in detail.

Klein confirmed Mrs. Thelan's testimony concerning the lack of general increases to the extent that, he testified, there

had previously been no schedule for periodic reviews of wages. The December 21 announcement, however, sets forth an initial wage rate of \$1.70 with progressive periodic increases up to \$2.10 and a statement of a "\$.15 per hour increase across the board." In view of the comparatively brief period of past service—18 months—required to reach the \$2.10 per hour rate, it is obvious that the increase for most employees was substantial and, for those in the employ of Respondent or its predecessor more than 18 months and still receiving \$1.60, they were actually \$.50 per hour, more than 30 percent.

There is, fortunately, less confusion regarding other terms of employment prior to December 21 and the change in them effected by the announcement of that date. (1) *Vacations*: Mrs. Thelan testified that prior to the increase she was entitled to 2 weeks' vacation but that, not having completed 10 years of employment with Respondent and Ryan-Evans combined, she would still receive 2 weeks' vacation until she had completed the 10 years. Klein confirmed her testimony that the maximum vacation period, prior to the announcement of December 21, was 2 weeks. The announcement established a range of vacations, based on length of total service, up to 4 weeks for an employee with 20 years of service. (2) *Holidays*: Mrs. Thelan named 5 days as holidays prior to the announcement: Christmas Day, New Year's Day, Thanksgiving Day, July 4th, and Labor Day. Klein testified that the employees had six holidays but he agreed with Mrs. Thelan that the change effected by the announcement of December 21 was merely to add the employee's personal birthday as a holiday for that employee. (3) *Rate of pay for work on consecutive Sundays or holidays*: They agreed that the straight rate had been applicable for the second day so worked and that the announcement established the overtime rate as the one payable for the second day, but Klein testified that care was taken to assure that no employee would be required to work on consecutive Sundays or holidays so that the benefit apparently extended would rarely become a reality. (4) *"Area parties"*: Mrs. Thelan testified that, prior to the dinner given December 21, 1969, she had never heard of any parties for the employees. Klein testified that there had been one in September 1968 and one in March 1969, as well as some "golf outings." The reference to "Periodic Area Parties" in the list of new benefits, he testified, contemplated their continuation without change. (5) *Employee discounts*: Both Mrs. Thelan and Klein testified that, prior to the announcement, employees were entitled to a discount of 15 percent on cosmetics and that the announcement added a 20 percent discount on prescriptions. There was no testimony on other changes in established conditions but the circular states that the medical and life insurance programs would continue unchanged, and that there would be a suggestion system.

#### IV DISCUSSION AND CONCLUSIONS

The brief submitted by the General Counsel consists entirely of a perfunctory summation based upon the evidence but without articulation of the legal theory underlying his case or citation of a single authority.<sup>6</sup> The rule of decision which

<sup>5</sup> This is not a finding that Klein deliberately misstated the facts but that, in the confusion engendered by the objections of Respondent's counsel to almost every question put by the General Counsel on this subject, by his prolonged argument following each ruling or attempt to clarify the question, and by his insistence that the record show his exception to every adverse ruling, Klein probably forgot the question and answered it, if at all, by referring to the rates current at the time of the trial, since those were the rates with which he was familiar at the time.

<sup>6</sup> The allegation in the complaint concerning the grant of "wage increases and other benefits to employees, after representation petitions . . . had been filed" indicates a theory of *per se* violation of Section 8(a)(1) based upon these two facts (although, when pressed on the subject, the General Counsel disavowed this theory) and, obviously so interpreting it, Respondent's counsel expended considerable time and energy in an attack upon the validity of the second of the filed petitions—the one relating to the salesclerks. If that was the theory of the General Counsel when the complaint was prepared, he was in error—the applicable rule of decision herein, as set forth below, precludes

*Continued*

I find applicable herein is the one that has been repeatedly invoked, by the Board and the courts, in cases involving the grant of benefits in a setting of organizational activity, and which was stated by the Supreme Court, in the *Exchange Parts* case,<sup>7</sup> as follows:

The broad purpose of § 8(a)(1) is to establish "the right of employees to organize for mutual aid without employer interference." . . . it prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonable calculated to have that effect.

Although in *Exchange Parts* the wage increases and other benefits were granted at a time when an election was imminent and the decision is expressed in language reflecting that situation, there is nothing in that or any of the other pertinent cases to indicate that there is a difference in the applicability of Section 8(a)(1) to situations involving wage increases during self-organizational activity before or after an election has been directed. In *Tonkawa Refining Co.*, 175 NLRB No. 102, the organizational activity was brought to the employer's attention on December 8, 1967, by a letter from the union claiming representation of a majority of the employees and requesting bargaining. This notice was followed by the union's filing of a representation petition on December 11, 1967. On January 24, 1968, the employer promised wage increases to the employees involved and, on January 28, put them into effect. The Direction of Election was issued February 1. In finding this extension of benefits by the employer violative of Section 8(a)(1) of the Act, the Board relied on and quoted from the *Exchange Parts* opinion of the Supreme Court.<sup>8</sup>

From the opinion of the Supreme Court in *Exchange Parts*, however, it is apparent that the mere grant of wage increases or other benefits during organizational activity will not automatically result in a finding of violation of Section 8(a)(1). The relevant portion of that opinion (at page 409) reads as follows:

We think the Court of Appeals was mistaken in concluding that the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the Union, does not "interfere with" the protected right to organize. [Emphasis supplied.]

Accordingly, as the Board pointed out in *Tonkawa Refining, supra*, the grant of a wage increase during an organizational campaign will not necessarily lead to a determination that the wage increase was violative of Section 8(a)(1) on the ground that the former "tends to interfere" with the latter, but it must be established, by evidence or inference from the facts, that it was the employer's motive, in giving the wage

increase, to interfere with employees' self-organizational activity.<sup>9</sup>

The inquiry into Respondent's motive in granting wage increases and other benefits in this case starts with the undisputed fact that Respondent had known for several days about the self-organizational activity among its employees when it made its announcement on December 24 (putting aside, for the moment, the finding herein that its awareness dated back to the beginning of December), since it had admittedly received, on December 18, both the filed petition and the letter from the Union. With this relationship between its knowledge and its action indubitably established, the burden of going forward with evidence shifts to Respondent.<sup>10</sup>

Respondent's evidence in support of its contention that, despite their timing, the wage increases and other benefits to the salesclerks in Phoenix were not granted for the purpose of interfering with their self-organizational efforts, came almost exclusively from Max Bunin, vice president of the parent company, who is in charge of store operations for the entire chain of 228 stores.

Bunin testified that, during the week of November 9, 1969, wage increases were given to the pharmacists in the Cleveland area and that there was, at that time, "a potential strike which did materialize shortly afterwards." Because of this situation, he testified, he determined to "do a little anticipating to try to avoid trouble" and he began to request information concerning "competitive wage rates" in areas where the operating companies did not have union contracts. On November 14, he testified, he asked Klein to get a list of comparative wage rates in the Tucson and Phoenix areas. Shortly thereafter, when he received the competitive wage information from the several operating companies, Bunin testified, he turned the data over to the parent company's labor counsel, John E. Purdy, whose function it was to recommend wage rates to Bunin and President Dworkin in Cleveland, and that new wage rates were "established" about the 18th or 19th of November. On December 1, he testified, a circular was issued to all stores in the chain making "a small adjustment" in prices on new prescriptions, which he characterized as an increase, and the price increases were put into effect on that day.

According to Bunin, he first heard of the organizing activity among the salesclerks on December 18, when Klein informed him of the receipt of the demand letter from the Union. Because of the organizing activity, he testified, the wage increases were not announced at the employees' dinner on December 21. The Tucson employees, however, both pharmacists and clerks, were not engaged in organizing, and they were directed to remain after the dinner at which time the salesclerks were informed of the wage increase and a recommendation was made to the pharmacists that they form a committee to discuss wage increases with management.

On December 24<sup>11</sup> Respondent distributed to its Phoenix

a finding of violation of Section 8(a)(1) of the Act upon no more than the grant of benefits at a time when a representation petition was on file. Equally in error, however, was the effort of Respondent, since the status of a representative petition of file is not subject to collateral attack by an attempt to impugn the "showing of interest" upon which the petition was accepted for filing (*N.L.R.B. v. National Truck Rental Co.*, 239 F.2d 422, 425 (C.A.D.C.), cert. denied 352 U.S. 1016; *General Engineering, Inc., and Harvey Aluminum*, 123 NLRB 586).

<sup>7</sup> *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409, reversing 304 F.2d 368 and enfg. 131 NLRB 806.

<sup>8</sup> See also *Goodyear Tire & Rubber Company*, 170 NLRB No. 79, in which it was found that the employer learned of union activity at the end of January and granted wage increases and other benefits in March. Although there was not even the filing of a representation petition in this case, the Trial Examiner relied on *Exchange Parts* in finding a violation of Section 8(a)(1) of the Act and the Board adopted his finding.

<sup>9</sup> See also *J J Newberry*, 183 NLRB No. 69.

<sup>10</sup> *Preston Products Company, Inc.*, 158 NLRB 122, 345, enfd. 392 F.2d 801 (C.A.D.C.).

<sup>11</sup> In explanation of this delayed announcement to the Phoenix salesclerks Respondent attempted to adduce evidence concerning conferences it had with the Resident Office of the Board in Phoenix. An outline of this transaction, most of which is supported by testimony, is as follows: Respondent noticed that the petition relating to the salesclerks states the number of employees in the unit involved as "approx. 96" and that there was no mark in either the "yes" or "no" box under the question "Is this petition supported by 30% or more of the employees in the unit?" Aware that it had approximately 198 salesclerks in the area, Respondent reported the information to a Board agent and raised a question concerning the sufficiency of the Union's "showing of interest." The Board agent apparently agreed with Respondent

salesclerks a statement of its "New Clerk Benefit Program—Effective 12/21/69" showing the wage increases and other benefits detailed above.

Respondent's contention, in short, is that the wage increases it granted on December 21 came as the result of a decision made, on a chainwide basis, by the parent corporation on November 18 or 19, and were not made by Respondent for the purpose of interfering with the organizational activities of its employees in Phoenix.

In support of this contention, Respondent's evidence consists of the unsupported testimony of Bunin,<sup>12</sup> a circular instructing store managers throughout the chain to raise prices on prescriptions as of December 1, an analysis purporting to show that, during the year 1969, there were about 100 voluntary quits among the 198 employees in Respondent's stores, and some papers relating to the arrangements for the dinner party of December 21.

Neither Bunin's testimony on this point nor the "documentary" evidence of Respondent is very impressive. Bunin made it clear that it was the bargaining situation and the subsequently executed threat of a strike in Cleveland that prompted him to begin a survey of wages throughout the unorganized portions of the chain about the middle of November. Moreover, by December 1, separate and apart from the organizational activities among the Phoenix salesclerks, Respondent was aware of similar activities among the pharmacists in Phoenix, since the petition relating to them had been filed November 26.<sup>13</sup> Klein testified that there had theretofore been no schedule for periodic review of wages,

and stated that the Union would be given 48 hours within which to submit the additional authorization cards required to support a petition involving a unit of 198 employees. Respondent's counsel offered to prove that the Board agent notified the Union's secretary that unless the additional cards were submitted by the 24th the petition would be dismissed. The questions addressed to Klein concerning statements of the Board agent were excluded as irrelevant but Nebeker, the Union's organizing agent, conceded that the Union's secretary told him of the Board agent's request for additional cards by the 24th and that he tried to obtain them. Whether he obtained them does not appear, but the petition was not dismissed and an amended petition, still stating the number of employees involved as "approx. 96" was filed December 29, 1969.

As stated above, Klein's testimony was excluded in part upon the ground that the "showing of interest" is not a litigable issue. In addition, the testimony was excluded because an informal action or an oral statement by a Board employee cannot be made the justification for conduct found to be an unfair labor practice (*West Texas Utilities Company, Inc.* 85 NLRB 1396, 1397-98, enf. 184 F.2d 233 (C.A.D.C.), cert. denied 341 U.S. 939; see also *Winter Seal Corp.* 117 NLRB 659, 661, *Stokely-Van Camp, Inc.* 130 NLRB 869, 870-871) and, finally, whether this representation petition was, or was not, on file is immaterial in this case since the critical element is Respondent's knowledge of organizational activity (see *Gordon Mfg. Co.* 158 NLRB 1303, in which increases given after the representation petition was withdrawn were held to constitute a violation of Section 8(a)(1) of the Act).

<sup>12</sup> Klein was called by the General Counsel as an adverse witness under Rule 43(b) of the Rules of Civil Procedure for the United States District Courts. Respondent's counsel, on cross-examination, asked Klein when he first found out about a wage increase for the Phoenix salesclerks and he answered "November 14." When Respondent's counsel pursued the subject, which had not been touched by the General Counsel, he was reminded that Rule 43(b) restricts cross-examination of an adverse witness to the subject matter of his examination in chief and that, therefore, the witness should be recalled and the subject pursued during the presentation of Respondent's case. Respondent's counsel agreed and terminated his questioning of Klein with the statement that he would bring him back. Klein was recalled as a witness during Respondent's case but was not questioned on this subject.

<sup>13</sup>At this time, i.e., between November 26 and December 24, 1969, Respondent had no way of knowing that the petition concerning the pharmacists would be dismissed in March 1970, upon acceptance of its contention that these pharmacists, by reason of their duties, were supervisors within the meaning of the Act. Bunin's testimony indicates, by his reference to negotiations and a strike, that the pharmacists in Cleveland are organized

and it was, therefore, against this background of general concern about union demands and specific awareness of organizational activity in Phoenix that Bunin made his decision with respect to wage increases. Furthermore, although I agree with Respondent that the setting of wage rates may be a routine function of management and that actions of that nature might not be reflected in minutes of the board of directors, it nevertheless seems to me reasonable to expect that in a chainwide move of that sort some documentation would exist directly concerning the matter and explaining the reasons for the costly change.

The argument that the direction to raise prescription prices on December 1 indicates that a decision had already been made to increase wages, places an unsupportable strain on my credulity and I reject it. According to Bunin, wage adjustments had been made in Cleveland and they were being considered for other places, so that a chainwide increase in prices was probably indicated, but it appears to me to have no relevance specifically to Respondent's stores. Despite Mrs. Thelan's lack of recollection concerning prior "area parties," Respondent is insistent that they had been a regular feature of management-employee relationships. Accordingly, neither the holding of the dinner-party on December 21 nor the contents of President Dworkin's invitation dated December 11 gives any support to the contention that, by making arrangements for it early in December, Respondent has proved that it had, at that time, reached a decision to announce wage increases at the dinner.

The list of "voluntary quits" I also find unconvincing. In the first place, the highest number of quits in any month, 16 out of a complement of 196 employees, does not seem large in a relatively unskilled labor pool, and Respondent has offered no evidence that a turnover of that size signals a serious problem in retaining employees. Moreover, the evidence shows that it was only in the months of January, May, and August—long before Bunin claimed to have begun investigating the adequacy of Respondent's wage rates—that there were 10 or more of these quits. In sum, I cannot see that the number of voluntary quits proves anything at all.

From the foregoing it follows, and I find, that Respondent has not shown that the wage increases and other benefits conferred upon its employees were the result of a decision reached without regard to the organizational activities of its employees. This is not to say that I disbelieve Bunin completely in his statement that top management had been giving consideration to granting general wage increases: it is simply that the evidence convinces me that the wage increases and other benefits to the Phoenix salesclerks were granted, to the substantial extent indicated and at that particular time, for the purpose of checking the impetus of the Union's organizational campaign and to put it in a less favorable position should an election subsequently be held. As the Court of Appeals for the Fifth Circuit recently wrote, in *N.L.R.B. v. Southwire Co.* 429 F.2d 1050, holding a wage increase unlawful:

The crucial fact to evaluate "is not whether [the Company] would have increased wages at some time or another . . . but whether the increase was granted when it was because of union activities." *N.L.R.B. v. Laars Engineers Inc.*, 9 Cir. 1964, 332 F.2d 664, 667.

Accordingly, I find that Respondent's grant of wage increases and other benefits to its employees as of December 21, 1969,<sup>14</sup> was for the purpose of interfering with the self-

<sup>14</sup> Respondent's argument that its good faith is somehow enhanced by its "circumspection" in delaying the announcement of wage increases to the Phoenix salesclerks, after it became aware, by the filing of the petition and

organizational activities of its employees and that Respondent thereby violated Section 8(a)(1) of the Act.<sup>15</sup>

The General Counsel argues that Respondent's conduct also "had the effect of discouraging employees from joining the Union" and that it was, therefore, also violative of Section 8(a)(3) of the Act. That section, however, defines the conduct made an unfair labor practice therein as "discrimination . . . to encourage or discourage membership" and, since there is no proof of discrimination in this record, the complaint must be dismissed to the extent that it alleges such violation.

#### V THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in sections 3 and 4, above, occurring in connection with its operations described in section 1, 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 thereof.

#### VI THE REMEDY

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

Upon the foregoing findings of fact and upon the entire record herein, I reach the following:

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By granting wage increases and other benefits to its salesclerks for the purpose of affecting the organizational campaign of the Union among those salesclerks, Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in the Act and has committed an unfair labor practice within the meaning of Section 8(a)(1) thereof.

4. The foregoing unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### RECOMMENDED ORDER<sup>16</sup>

Upon the basis of the above findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that Revco Drug Centers of the West, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Granting wage increases or other benefits to employees for the purpose of impeding or interfering with their self-organizational activities; provided, however, that nothing herein shall be construed to require said Corporation to revoke any wage increases or benefits heretofore granted.

receipt of the demand from the Union, of the self-organizational activity and did not announce them until the 48-hour period had expired, has been dealt with above. It is hardly an argument to be used in a matter involving a question of motive or good faith but one more suited to areas of law where the consequences can be made responsive to factual conditions within the control of the interested parties

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own 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.

2. Take the following affirmative action to effectuate the policies of the National Labor Relations Act, as amended:

(a) Post immediately at each of its stores in Maricopa and Pinal Counties, Arizona, copies of the attached notice marked "Appendix."<sup>17</sup> Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by it 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.

(b) Notify the Regional Director for Region 28, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.<sup>18</sup>

IT IS FURTHER RECOMMENDED that the allegations of the complaint, insofar as not found violative of the act in the Decision, be dismissed.

<sup>15</sup> See *Great Atlantic & Pacific Tea Company, Inc* 162 NLRB 1182, 1184; *J J Newberry*, 183 NLRB No. 69, *St Louis Car Division General Steel Industries Inc* 184 NLRB No. 55.

<sup>16</sup> 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.

<sup>17</sup> 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."

<sup>18</sup> In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 28, in writing, within 10 days from the date of this Order, what steps 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

The trial which was held May 13 and 14, 1970, at Phoenix, Arizona, on the complaint issued by the General Counsel of the National Labor Relations Board, and at which all parties had an opportunity to present evidence, has resulted in a decision that our grant of wage increases and other benefits as of December 21, 1969, to the salesclerks in our stores in Maricopa and Pinal Counties was for the purpose of interfering with the organizing campaign then being carried on by some of our employees in conjunction with Retail Clerks Local Union No. 99, AFL-CIO, and that our conduct constituted an unfair labor practice in violation of the National Labor Relations Act, as amended. The order issued with the decision, however, states that nothing therein

shall be construed to require us to revoke any wage increases or benefits granted. In accordance with that decision, and as directed by the order issued with it, we are posting this notice to assure our employees that

We will not grant wage increases, or other benefits, for the purpose of interfering with the self-organizational efforts of our employees or to interfere with their activities on behalf of the above-named Union or any other labor organization.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own 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.

All our employees are free to become or remain, or

to refrain from becoming or remaining, members of the above-named Union or any other labor organization.

REVCO DRUG CENTERS OF THE WEST,  
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, 7011 Federal Building & U.S. Courthouse, 500 Gold Avenue, Southwest, P.O. Box 2146, Albuquerque, New Mexico 87101, Telephone 505-843-2507.