

**Allied Foods, Inc. and General Teamsters Local Union No. 528, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 10-CA-8684

March 31, 1971

## DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS  
FANNING AND BROWN

Upon a charge filed on November 3, 1970, by General Teamsters Local Union No. 528, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Allied Foods, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 10, issued a complaint on December 11, 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 or about July 1, 1970, following a Board election in Case 10-RC-8126 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 October 22, 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 December 21, 1970, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and requesting that the complaint be dismissed in its entirety. More specifically, Respondent admits all allegations of the complaint, including the request and refusal to bargain, except it denies that an uncoerced majority of the unit employees designated the Union as their bargaining representative, that the Union was properly certified, and that the Union is the exclusive representative of the employees in the unit found appropriate. Respondent further denies the conclusionary allegation that it has violated

Section 8(a)(5) and (1) of the Act. Additionally, Respondent raises certain affirmative defenses, which will be discussed *infra*.

On January 20, 1971, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, alleging there are no issues of fact or law requiring an evidentiary hearing and requesting that the Board grant the Motion for Summary Judgment. Subsequently, on February 1, 1971, 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 cross Motion for Summary Judgment and response to General Counsel's Motion for Summary Judgment.

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 MOTIONS FOR SUMMARY JUDGMENT

The record in Case 10-RC-8126 reflects that pursuant to a petition filed on February 13, 1970, the Regional Director conducted an election in which a majority of the employees in the appropriate unit cast votes in favor of the Union. Thereafter, Respondent filed timely objections alleging that (1) a change in the ballot shortly before the election, after the withdrawal of the intervenor, caused sufficient confusion in the minds of the voters to affect the results of the election; (2) the Regional Director improperly denied Respondent's motion for postponement of the election due to the change in the wording of the ballot; (3) organizational efforts on behalf of the Union were made by asserted Supervisor William R. Towe, with the assistance of another supervisor; and (4) the Regional Director acted arbitrarily in proceeding with the election while an appeal was pending before the General Counsel on the Regional Director's refusal, on March 18, 1970, to issue a complaint in Case 10-CB-1903, which alleged that the Union had violated Section 8(b)(1)(A) of the Act by enlisting the services of Supervisor William R. Towe during its organizational campaign.

Following administrative investigation, the Regional Director on July 1, 1970, issued a Supplemental Decision and Certification of Representative in

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 10-RC-8126, 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 (C.A. 4,

1968), *Golden Age Beverage Co.*, 167 NLRB 151, *Intertype Co v Penello*, 269 F. Supp 573 (D.C. Va., 1967), *Follett Corp.*, 164 NLRB 378, enfd 397 F.2d 91 (C.A. 7, 1968), Sec 9(d) of the NLRA

which he found that the objections filed by Respondent did not raise substantial or material issues affecting the results of the election. The Regional Director found that (1) the revised notices of election were posted for more than 2 days prior to the election, which was an adequate time for the voters to have an opportunity to examine and become familiar with the material therein; (2) no evidence was presented showing that supervisors engaged in organizational efforts on behalf of the Union during the critical period after the filing of the representation petition on February 13, 1970; and (3) there was no merit to the objection based on the Union's use of alleged Supervisor Towe to assist in organizing employees—which also was the subject of a charge filed by Respondent in Case 10-CB-1903 alleging violation of Section 8(b)(1)(A) of the Act<sup>2</sup>—because all the evidence submitted by Respondent during the prior investigation of Case 10-CA-8118, in which a complaint had issued alleging Respondent's discharge of Towe as violative of Section 8(a)(3), did not establish his supervisory status as defined in the Act. After finding that the election had been conducted in accordance with the Board's customary policies and procedures, the Regional Director accordingly overruled the objections and certified the Union as the exclusive representative of Respondent's employees in the unit found appropriate.

On August 4, 1970, Respondent filed with the Board a Request for Review of the Regional Director's Decision in which it renewed the contentions raised in its objections to the election. With respect to its objection concerning supervisory participation in the union organizational campaign, Respondent acknowledged that although there was no evidence of supervisory assistance subsequent to the filing of the petition on February 13, 1970, which led to the election in the representation case, it urged the Board not to apply the *Ideal Electric* cutoff rule<sup>3</sup> in cases involving supervisory assistance and participation in a union organizational campaign. In addition, Respondent contended that in any event the cutoff date should not have been February 13, 1970, as found by the Regional Director, since the Union had respectively filed, and then withdrew prior petitions for the same unit on January 12 and 21, 1970. Although Respondent acknowledged that the first petition was untimely filed, it contended that even if that petition were disregarded, a petition nevertheless was continuously pending for the unit found appropriate on and after January 21, 1970, and asserted that where overlapping, successive petitions are filed for the same

unit, they should be treated as a single petition for purposes of the cutoff date for consideration of objections. Respondent finally contended that the Regional Director committed prejudicial error by overruling its objections without benefit of a hearing. Upon consideration of the request for review, the Board on November 16, 1970, denied it as raising no issues warranting review.

In its answer to the complaint, cross Motion for Summary Judgment, and Response to General Counsel's Motion for Summary Judgment, Respondent reiterates the contentions previously advanced in its objections to the election and request for review. In addition, Respondent contends, in effect, that special circumstances exist in this case in view of the fact that the basis upon which the Regional Director refused to consider the merits of the objections based on Towe's conduct—his conclusion following investigation of the charge in Case 10-CA-8118 that Towe was not a supervisor—has subsequently been overturned by the Board's decision in that case, *Allied Foods, Inc.*, 186 NLRB No. 150. The Board thus found in the latter case that Towe was in fact a supervisor within the meaning of the Act and that his discharge on January 12, 1970, for engaging in union activities, was therefore privileged and not violative of Section 8(a)(3) of the Act. Respondent argues that in view of this intervening Board decision, it should now be permitted to litigate the merits of the issue concerning not only the participation and assistance by Towe in the Union's organizational campaign, but also that of alleged Supervisors Damon Heath and Oscar Foster. In support of its contention concerning the involvement of these three individuals in the organizational campaign, Respondent has attached various affidavits to its response to General Counsel's Motion for Summary Judgment, treated herein as an offer of proof, which in substance reflect the following: Although William R. Towe was a moving force in the union campaign, he was discharged on January 14, 1970, for his participation therein. Can Line Foreman Oscar Foster signed an authorization card away from the plant on an undetermined date in January 1970 and on a number of occasions (the last possibly within 30 days of the election) pointed out to certain employees the differences between union and nonunion pay scales and outlined some of the benefits of a union contract. Foster did not, however, attend any union meetings or solicit authorization cards. Third Shift Foreman Damon Heath attended two union meetings, one on January 11, 1970, and another "about three weeks or a month later." At the first

<sup>2</sup> We take administrative notice of the fact that the General Counsel on January 11, 1971, sustained the Regional Director's Dismissal of the charge in Case 10-CB-1903

<sup>3</sup> See *Ideal Electric and Manufacturing Company*, 134 NLRB 1275, where

the Board held that conduct which occurs prior to the filing of the representation petition will not be considered as grounds for setting aside the election

meeting, Heath signed "a paper for the Union" and also signed an authorization card on an unspecified date. At union headquarters before both meetings, Heath talked to employees "about different problems that we needed to correct and benefits we wanted to get through the Union." Sometime during January 1970, Heath also wore one or more union buttons for 2 days in the plant, and also talked to at least two employees "in favor of the Teamsters Union," telling one of them that "if we got the Teamsters in here, we could get a little better organized."

Although we agree that our intervening decision in Case 10-CA-8118 constitutes sufficient "special circumstances" to warrant review of the determination made in the representation proceeding concerning alleged supervisory participation in the union organizational campaign, after such review we nevertheless reaffirm the determination made therein. We are thus satisfied that there is no basis warranting departure from the *Ideal Electric* rule in this case and consider the date upon which the operative petition was filed, February 13, 1970, as the critical date for consideration of the objections to the election. Furthermore, even assuming that the alleged conduct in question occurred during the critical period prior to the election, we are not convinced that the conduct in any event would constitute grounds for setting aside the election. The asserted participation and assistance of Heath and Foster was of a minimal nature which would not have affected the results of the election.<sup>4</sup> Moreover, the discharge of Towe for engaging in union activities, which occurred 2 days after the first, and untimely, petition, not only effectively removed any taint occasioned by his activity on behalf of the Union, but would also have similarly removed any possible taint attached by the very limited participation of Foster and Heath.

We find, furthermore, that the Regional Director's processing of the representation proceeding in light of the charges in Cases 10-CA-8118 and 10-CB1903 was fully in accord with customary Board policies and procedures.<sup>5</sup>

We also reject Respondent's contention that it has been denied due process by the overruling of its objections without benefit of a hearing. It is well established that parties do not have an absolute right to a hearing on objections to an election. It is only when the moving party presents a *prima facie* showing of "substantial and material issues" which

would warrant setting aside the election that he is entitled to an evidentiary hearing.<sup>6</sup> As previously noted, Respondent's proffered evidence with respect to supervisory participation in the organizational campaign, even if true, and even if we were not to apply the *Ideal Electric* rule, would not constitute grounds for setting aside the election. As for Respondent's contention that it was entitled to a hearing to present evidence of the confusion in the minds of employees caused by the change in ballot shortly before the election, we are satisfied that the evidence objectively establishes that the revised election notices were posted for a sufficient period of time prior to the election to enable individual employees to become apprised of the change in the ballot and to make an informed choice. We therefore reject Respondent's contention that it was entitled to a hearing to present evidence of alleged confusion that existed in the minds of individual employees.

It is equally 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>7</sup>

All issues raised by the Respondent in this proceeding were or could have been raised 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 additional special circumstances exist herein which would require the Board to otherwise reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any other issues which are properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the General Counsel's Motion for Summary Judgment, and deny the Respondent's cross 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 is, and has been at all times material herein, a Georgia corporation, with its principal office and place of business located at Atlanta, Georgia, where it is engaged in the manufacture and sale of

<sup>4</sup> See *Brown-Dunkin Company*, 118 NLRB 1603

<sup>5</sup> See Section 11730.2 of the Board's Public Field Manual, which deals with concurrent charge and representation cases and provides that the disposition of a charge case (a dismissal, though appealed, is considered a disposition) will serve to unblock the representation case and the Regional Director in such circumstances should proceed as if there were no concurrent charge. See also *Coffey's Transfer Company*, 115 NLRB 888

<sup>6</sup> See, e.g., *NLRB v. DIT-MCO Incorporated*, 428 F.2d 775 (C.A. 8),

*Liberty Coach Company, Inc. v. NLRB*, 418 F.2d 1191 (C.A.D.C.), *National Cash Register Co. v. NLRB*, 415 F.2d 1012 (C.A. 5), *Polymers, Inc. v. NLRB*, 414 F.2d 999 (C.A. 2), cert. denied 396 U.S. 1010, *Intertype Company v. NLRB*, 401 F.2d 41 (C.A. 4), cert. denied 393 U.S. 1049, *Plastic Fabricating Co., Inc.*, 179 NLRB No. 86, and cases cited therein at fn. 1, *Golden Age Beverage Company, supra*

<sup>7</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)

food products, both food for human and food for animal consumption.

Respondent, during the past calendar year, which period is representative of all times material herein, sold and shipped finished products valued in excess of \$50,000 directly to customers located outside the State of Georgia.

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

General Teamsters Local Union No. 528, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE 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 production, maintenance and warehousing employees of Respondent's Atlanta, Georgia, operation, including service department employees, quality control department employees, garage employees, and can line shift leadmen, but excluding all truck drivers, office clerical employees, salesmen, professional employees, watchmen and guards; pet food plant manager, assistant plant manager and shift foremen; IMP manager or plant manager, assistant plant manager and foremen; O-C-O plant manager, pressroom foreman, machine shop foreman and can line foreman; manager of S & R warehousing, dock foreman, and garage foreman; service department supervisors; and all other supervisors as defined in the Act.

#### 2. The certification

On May 7, 1970, 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 10, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on July 1, 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 October 6, 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 October 22, 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 October 22, 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 Foods, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Teamsters Local Union No. 528, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production, maintenance and warehousing employees of Respondent's Atlanta, Georgia, operation, including service department employees, quality control department employees, garage employees, and can line shift leadmen, but excluding all truck drivers, office clerical employees, salesmen, professional employees, watchmen and guards; pet food plant manager, assistant plant manager and shift foremen; IMP manager or plant manager, assistant plant manager and foremen; O-C-O plant manager, pressroom foreman, machine shop foreman and can line foreman; manager of S & R warehousing, dock foreman, and garage foreman; service department supervisors; and all other supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 1, 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 October 22, 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 Foods, Inc., Atlanta, Georgia, 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 General Teamsters Local Union No. 528, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production, maintenance and warehousing employees of Respondent's Atlanta, Georgia, operation, including service department employees, quality control department employees, garage employees, and can line shift leadmen, but excluding all truck drivers, office clerical employees, salesmen, professional employees, watchmen and guards; pet food plant manager, assistant plant manager and shift foremen; IMP manager or plant manager, assistant plant manager and foremen; O-C-O plant manager, pressroom foreman, machine shop foreman and can line foreman; manager of S & R warehousing, dock foreman, and garage foreman; service department supervisors; and all other supervisors as defined in the Act.

(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 Atlanta, Georgia, facility copies of the attached notice marked "Appendix".<sup>8</sup> Copies of said notice, on forms provided by the Regional Director for Region 10, 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 10, in

<sup>8</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."

writing, within 20 days from the date of this Order, what steps have been 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 concerning rates of pay, wages, hours, and other terms and conditions of employment with General Teamsters Local Union No. 528, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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 production, maintenance and warehousing employees of Respondent's Atlanta,

Georgia, operation, including service department employees, quality control department employees, garage employees, and can line shift leadmen, but excluding all truck drivers, office clerical employees, salesmen, professional employees; watchmen and guards; pet food plant manager, assistant plant manager and shift foremen; IMP manager or plant manager, assistant plant manager and foreman; O-C-O plant manager, pressroom foreman, machine shop foreman and can line foreman; manager of S & R warehousing, dock foreman, and garage foreman; service department supervisors; and all other supervisors as defined in the Act.

ALLIED FOODS, 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, Room 701, 730 Peachtree Street, N.E., Atlanta, Georgia 30308, Telephone 404-526-5760.