

Wigwam Stores, Inc. and Retail Store Employees' Union, Local 631, Retail Clerks International Association, AFL-CIO. Case 19-CA-4629

September 30, 1971

DECISION AND ORDER

**BY CHAIRMAN MILLER AND MEMBERS
FANNING AND JENKINS**

Upon charges filed by the Charging Party, Local 631, on January 19, 1970, the General Counsel of the National Labor Relations Board by the Regional Director for Region 19 issued a complaint and notice of hearing on July 2, 1970, against the Respondent, Wigwam Stores, Inc. The complaint alleges in substance that the Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended. In its duly filed answer, the Respondent admits certain allegations of the complaint, denies all unfair labor practice allegations, and avers an affirmative defense. On September 8, 1970, the parties, including the General Counsel, entered into a stipulation of facts for submission to the Board in which, *inter alia*, they requested that this proceeding be transferred to the Board. In the stipulation the parties agreed in effect that the formal papers filed in this proceeding and the stipulation, together with the attached exhibits and the order postponing hearing indefinitely, would constitute the entire record in this case, and agreed that no oral testimony was necessary or desired. They waived their right to a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's decision. The stipulation provided for the filing of briefs with the Board.

On September 14, 1970, the Board issued its order granting motion approving stipulation and transferring proceedings to the Board. Thereafter the General Counsel, the Charging Party, and the Respondent filed briefs. On March 18, 1971, the Board issued an order remanding proceeding on grounds that the stipulation did not set out with sufficient completeness and clarity all relevant facts which might bear on the issues of the case. On April 16, 1971, a joint motion for reconsideration of order remanding proceeding and supplemental stipulation was filed by the Respondent, Charging Party, and the General Counsel, wherein the facts considered relevant by the

parties were reiterated and the Charging Party's brief withdrawn.¹

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the entire record in this case, including the briefs of the Respondent and the General Counsel, and makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent by its answer admits that it is a Washington State corporation engaged in the operation of retail department stores in Yakima, Washington, and elsewhere in the State of Washington. The dollar volume of the Respondent's sales annually exceeds \$500,000. During the calendar year 1969, the Respondent made purchases valued in excess of \$500,000 which were shipped to the above stores from points outside the State of Washington. The parties stipulated and we find that the Respondent is, and at all times material herein has been, an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The parties agree and we find that the Charging Party, Retail Store Employees' Union Local 631, Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

On March 11, 1969, following a Board-conducted election, the Acting Regional Director for Region 19 certified the Charging Party as the exclusive bargaining representative of all employees in the appropriate unit.²

After several meetings and bargaining sessions during the ensuing 12 months, the negotiators met the morning of March 23, 1970, and reached oral agreement; and the Union requested the Respondent to execute a collective-bargaining contract based thereon. That afternoon General Manager Phillips, who had negotiated the agreement for the Respondent, received a telephone call from Boyles, manager of the Yakima store where the unit employees worked,

All persons engaged in handling or sales of merchandise employed by the Employer and its leased departments at the Yakima, Washington, store, excluding all other employees, managers, office clerical employees, professional employees, guards and supervisors as defined in the Act

¹ We shall grant the parties' joint motion, and base our decision solely on the facts which have been stipulated to by the parties

² The Respondent further admits and we find that the following unit constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act

informing Phillips that Boyles had received a letter signed by all four unit employees. The letter, dated March 19, 1970, was addressed to the National Labor Relations Board and requested decertification of the Union.³ Boyles had not been aware of this letter until March 23, because he had just returned from vacation.

Thereafter, the Respondent refused to execute the collective-bargaining agreement previously orally agreed to.

The stipulated facts show, and we find, that the Charging Party lost its majority status on March 19, after the end of the certification year and 4 days before an agreement was reached with the Respondent. Thereafter, the Union was without authority to bargain on behalf of the employees or to sign a contract with the Respondent. Therefore, the Respondent's refusal to sign the agreement with the Union on March 23 and thereafter was not an unfair labor practice within the meaning of Section 8(a)(5) and (1).⁴ Accordingly, we shall dismiss the complaint in its entirety.⁵

³ An RD petition was sent to the Regional Office by one of the four unit employees on March 31, 1970. However, as that petition was unsigned, it was returned to the employees for signature. The petition was refiled, and docketed by the Regional Office on April 3, 1970.

⁴ Cf. *Indiana Ready Mix Corporation*, 141 NLRB 651, 660. The Board and the courts have clearly indicated that where, as here, the presumption of union majority status which obtains after the end of the certification year has been rebutted by evidence establishing that such status has, in fact, ceased to exist, the employer's refusal to bargain is not unlawful. *Ray Brooks v. N.L.R.B.*, 348 U.S. 96; *N.L.R.B. v. Whittier Mills Company et al.*, 111 F.2d 474, 478; *U.S. Gypsum Company*, 90 NLRB 964, 965.

As the Board long ago intimated, where the certification year has expired, an employer may have to act at his peril in deciding whether the union's presumptive majority status continues to exist in fact, and the outcome of any subsequent 8(a)(5) proceeding might hinge on the

CONCLUSIONS OF LAW

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

2. The Union, Retail Store Employees' Union Local 631, Retail Clerks International Association, AFL-CIO, is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent is not violating Section 8(a)(5) and (1) by refusing to sign an agreement, since the Union does not represent a majority of the Respondent's employees.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Board's order remanding proceeding dated March 18, 1971, be, and it hereby is, revoked; and the complaint herein be, and it hereby is, dismissed in its entirety.

correctness of that decision. *Stoner Rubber Company*, 123 NLRB 1440. Since here we find that the Union lost its majority status prior to any agreement, the Respondent's decision not to sign the agreement was proper and not violative of Section 8(a)(5).

⁵ Member Fanning agrees that Respondent did not violate Section 8(a)(5) by refusing to execute a previously agreed-to contract on the ground that it doubted the Union's majority status. In his view, the employee letter indicating a desire for a decertification election furnished Respondent with reasonable ground for doubting the Union's continuing majority. *Celanese Corporation of America*, 95 NLRB 664, 672-673. He does not, however, view such letter as constituting sufficiently reliable evidence of loss of majority as to permit Respondent to take unilateral action with respect to matters subject to collective bargaining. The question concerning representation involved herein can best be resolved by a Board election. See the dissenting opinion in *Stoner Rubber Company*, 123 NLRB 1440.