Walgreen Company *and* Retail Clerks Union, Local 1352, Retail Clerks' International Association, AFL–CIO. Case 20–CA–6587

February 15, 1972

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND KENNEDY

On October 13, 1971, Trial Examiner James R. Hemingway issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed cross-exceptions, a brief in support thereof, and an answering brief to General Counsel's and Charging Party's exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

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 complaint issued herein be dismissed in its entirety.

[1] The Charging Party in addition filed a Motion to Supplement the Record and the Respondent filed a Motion to Deny In view of the fact that the Charging Party by its motion seeks to place in the record as evidence posthearing signed affidavits and authorization cards which have no bearing on the issues presented at the hearing, the motion is hereby denied

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

JAMES R. HEMINGWAY, Trial Examiner: This case was heard at Santa Rosa, California, on August 31, 1971.[1] The charge was filed on February 16, and the complaint was issued on June 28. The sole issue is whether or not the Respondent violated Section 8(a)(5) of the Act when it refused to bargain collectively with the Union, where, after an election involving both professional and nonprofessional employees in a single unit, at which it was obvious from the different colored ballots of the professionals that they had voted for the Union, and after it was determined administratively that the Union had lost the election, the Union then requested the Respondent to recognize it as bargaining representative of the professional employees alone.

Briefs were received from each of the three parties on October 4, 1971, and have been considered. Upon the entire record, including the testimony of the sole witness, I make the following:

[1] All dates are in 1971

FINDINGS OF FACT

I JURISDICTION

The complaint alleges and the answer admits that Respondent, an Illinois corporation, with a place of business at Petaluma, California, and at other locations throughout the United States, is engaged in the retail sale of drugs and sundries; that during the year preceding the issuance of the complaint, Respondent, in the course and conduct of its business operations, had gross sales in excess of $500,000; and that during the same year, Respondent, in the course and conduct of its business operations, purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of California.

On the foregoing facts, I find that the Board has jurisdiction and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II ALLEGED UNFAIR LABOR PRACTICES

A *The Refusal to Bargain*

The parties stipulated to the following facts:

1. On November 20, 1970, the Charging Party, by letter to the Respondent, demanded to be recognized as the exclusive bargaining representative for all employees (excluding store manager) employed at the Respondent's store located at 105 North McDowell Road, Petaluma, California

2. On November 23, 1970, the Respondent, by letter to the Charging Party, declined to recognize the Charging Party and expressed its willingness to resolve the question of the Charging Party's majority status by means of a Board-supervised election.

3. On November 24, 1970, the Charging Party filed a petition for representation with the Regional Director for Region 20 of the National Labor Relations Board. In such petition, the Charging Party claimed to represent all employees, including pharmacists, at the Respondent's store located at 105 North McDowell Road, Petaluma, California. At that time the matter became identified as Case 20–RC–9720.

4. On December 22, 1970, the Charging Party and the Respondent entered into a stipulation for certification upon a consent election agreement which was approved by the Regional Director. Such stipulation, in addition to providing for a polling of nonprofessional store employees, provided for a polling of the two professional employees (pharmacists). Such professional employees, in accordance with the terms of the stipulation for certification upon consent election agreement, would be asked to vote on two questions, to wit: (1) Do you desire to be included with nonprofessional employees in a single unit for collective bargaining? (2) Do you wish to be represented by Retail Clerks' Union, Local 1532, RCIA, AFL–CIO?

5. On January 20, 1971, a National Labor Relations Board supervised election was conducted in Case 20–RC–9720 The two professional employees unanimously voted to be included for the purpose of collective bargaining in a single unit with the nonprofessional store employees. In accordance with the terms of the stipulation for certification upon a consent election agreement, the votes of the two professional employees, with respect to their desires relative to union representation, were counted together with the votes of the nonprofessional voting group. The combined votes of the professional voting group and the nonprofessional voting group, with respect to the question of union representation indicated, by a vote of 7 to 4, that no collective-bargaining representative had been selected

6. On January 28, 1971, the Regional Director for Region 20 issued a certification of results of election in Case 20–RC–9720.

7. On February 1, 1971, the Charging Party by letter to the Respondent, demanded that the Respondent recognize such Charging Party as the exclusive bargaining agent for the two professional employees employed at the Respondent's store located at 105 North McDowell Road, Petaluma, California.

8. On February 5, 1971, the Respondent, by letter to the Charging Party, declined to recognize the Charging Party as the exclusive bargaining representative for any employees employed by the Respondent in the store located at 105 North McDowell Road, Petaluma, California.

9. On February 16, 1971, the Charging Party filed a charge with the National Labor Relations Board, alleging violations of Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act, in the instant case.

10. On March 26, 1971, the Regional Director for Region 20 refused to issue a complaint in this case.

11. On April 7, 1971, the Charging Party appealed the Regional Director's refusal to issue a complaint to the General Counsel for the National Labor Relations Board.

12. On June 21, 1971, the General Counsel sustained the Charging Party's appeal and instructed the Regional Director for Region 20 to issue a complaint in this case.

13. On June 28, 1971, the Regional Director for Region 20 issued the complaint in this case.

In addition to the foregoing stipulated facts, the General Counsel offered the following evidence: At the election, the two pharmacists were given blue (or green, but herein called blue) ballots with two questions on each, the questions being those stated in paragraph 4 of the stipulation hereinabove related. The ballots of the rest of the employees were pink. Following the aforesaid election, the Board agent removed the ballots from the ballot box, separated the blue ones from the pink ones, and then read off to the observers the results of the voting, first on the two questions on the blue ballots, and then on the one question on the remaining ballots. There were present in the room not only the Board agent and the two observers of the election, but also representatives of the Union and the Respondent, who were standing in a doorway observing the counting of the ballots. The observers signed the tally of ballots. No evidence of any independent violation of Section 8(a)(1) was presented. I find that the evidence shows that the pharmacists voted to be included in a unit with the nonprofessionals, that they voted in that unit for the Union, and that Respondent knew these facts.

III ARGUMENTS AND CONCLUSIONS

The Respondent argues, in part, that to permit the General Counsel and the Union to present evidence of majority by proving what was on the pharmacists' ballots would be in violation of the secrecy of the ballot required under Section 9(c)(1)(A) of the Act, citing *J. Brenner & Sons, Inc.*, 154 NLRB 656 (n. 4 on page 659). The General Counsel counters this argument by citing *Triple J. Variety Drug Company*, 168 NLRB 988, where the Board certified the results of an election involving one pharmacist and a group of nonprofessional employees. There the pharmacist refused to vote a different colored ballot on the ground that, even if he voted for inclusion in the larger unit, his vote on the second question on the ballot would not be secret. His protest was without avail. His unmarked ballot was required to be put in the ballot box. The employer objected to the results of the election (a 13 to 12 vote in favor of the Union), but the Board overruled the objection. Member Zagoria, in a dissenting opinion, pointed out a method by which, in an election involving both a professional employee and a nonprofessional group of employees, secrecy of the vote of the professional on the question of whether or not he wished the union to represent him could be assured by the use of two ballots rather than by the use of one with two questions on it. But the Board apparently did not thereafter adopt that suggestion; so the same, or a similar, problem of nonsecrecy was presented here. However, since the evidence shows that the Board agent had read out, in the hearing of Respondent's representatives, the vote on each ballot, including that on each blue ballot, since the observers had an opportunity to see the ballots themselves, and had certified the tally, the Respondent does not dispute the fact that the two pharmacists in this case did vote for the Union.

It may be conceded, as the General Counsel and the Union argue, that Section 9(c)(3) of the Act, which bars another election within a year after the first one, would not preclude a finding of a refusal to bargain upon request made after the union which lost the election or another union, makes a new showing of majority. The leading case in support of such proposition is *Conren, Inc. d/b/a Great Scot Supermarket*, 156 NLRB 592.[2] Of course, that case did not involve a request to bargain in a different unit, and the union offered proof of majority by authorization cards procured after the date of the election. The case at hand differs from *Conren* in that here the request to bargain was for a different unit albeit one containing employees who had voted in the prior election. The General Counsel, however, to overcome this distinction, cites *Stecher-Traung-Schmitt Corporation*, 172 NLRB No. 186, enfd. 408 F. 2d 613 (C.A. 2); and *Pacific Abrasive Supply Co.*, 182 NLRB No. 48, as involving a request by a union to bargain in a unit smaller than the one involved in the election which the union had lost less than a year prior thereto. In the *Stecher* case, the union had lost an election involving employees in a larger unit which included, among others, a group of five composing-room employees at the employer's plant, for whom, after the election, the Union claimed bargaining rights. But in that case, not only did the Union offer to prove its majority by a card check, but there was further proof that the five employees desired to be represented in the smaller unit because three of the five had informed a foreman that all had signed cards and, at a meeting set up by the union with the employer's superintendent, four of the five employees from the composing room attended and told the superintendent that they wished to be represented by the union in a composing-room unit. The employer in that case refused to bargain on the ground that the unit was not appropriate for the purpose of collective bargaining. On the evidence presented, the Board found the unit to be appropriate and found that the employer had independent knowledge that the Union had a majority in the unit, knowledge which it had acquired from the employees themselves. In the *Pacific Abrasive* case, there was also a claim by a union to represent employees in a smaller unit after the Union had lost an election involving a larger unit. But in that case, the employees in the smaller unit very positively demonstrated that they desired to be represented separately when they struck and picketed the employer following a refusal by the employer to recognize the Union in that unit. The persistence of the employer thereafter in refusing to bargain constituted the unfair labor practice.

None of the cases relied on by the General Counsel, however, involved a self-determination election. Nevertheless, the General Counsel and the Union claim that a violation of Section 8(a)(5) of the Act is made out by the showing that the Respondent knew that the pharmacists had voted for the

[2] See also *Rocky Mountain Phosphates, Inc.*, 138 NLRB 292, *Astoria General Tire Co.*, 170 NLRB 591, *Graham Ford*, 172 NLRB No. 50, *Cincinnati Gasket, Packing & Mfg.*, 163 NLRB 763, 765, fn 4

Union in the election involving both professional and nonprofessional employees, and, they reason, the Respondent therefore knew that the Union had a majority in a smaller unit of pharmacists alone but still refused the Union's request to bargain for the pharmacists. The Respondent argues first that there has been no evidence presented to indicate that the Union represented a majority of the employees in question at the time of the Respondent's refusal to bargain (February 5), and, second, assuming for the sake of argument that the Charging Party did represent a majority of the employees in question (pharmacists) the Respondent, on the facts of the instant case, did not unlawfully refuse to bargain.

The Respondent's first argument, that it was incumbent on the Union to show that it had a majority on the very date of the refusal to bargain, I consider to be of little weight. If the majority had been demonstrated by new authorization cards, say on January 25, that majority would be presumed to carry to February 5 in the absence of a showing by Respondent that the Union had lost its majority in the interim. Here, it is not to be presumed that the two pharmacists had quit or had changed their minds before February 5, and the Respondent made no claim of loss of majority by the Union as a reason for its refusal to bargain.

However, the Respondent's second argument, that, on the facts of this case, the Respondent did not unlawfully refuse to bargain rests, I infer, upon the ground that the pharmacists had not, since the election (in which they had consent to be represented in a larger unit), indicated that they wished to be represented by the Union in a unit by themselves. Here, in a self-determination election, the pharmacists, by choosing to be in a unit with nonprofessional employees, in effect had voted not to be represented in a unit by themselves. Yet, the theory of the General Counsel and the Union is that, by voting affirmatively on the second question on their ballots in that election—the one as to whether or not the pharmacists desired to be represented by the Union in an overall unit—that second vote on their ballots alone showed that the pharmacists desired to be represented by the Union in the very unit which they had rejected in answering the first question on their ballots. In other words, the General Counsel and the Union are saying that by voting for the Union on the second question, the pharmacists were saying that they wanted the Union to represent them regardless of unit.

On the facts of this case, there is absolutely no way of knowing whether the pharmacists would have chosen the Union to represent them separately in a unit limited to professionals. In a unit limited to professionals, the pharmacists might have preferred to be represented by a different union, one that represented only pharmacists, or they might have deemed such a unit to be too small to be effective and therefore chosen to be represented by no union. I am of the opinion that, on the facts of this case, no presumption should be indulged in that the pharmacists after the election desired representation by the Union in a unit by themselves.

I conclude and find, therefore, that the General Counsel has not proved that the pharmacists had chosen the Union to represent them in a unit limited to pharmacists and, hence, I find that the Respondent has not refused to bargain with the Union in violation of the Act.

Conclusions of Law

1. Walgreen Company is an employer within the meaning of Section 2(2) of the Act and is 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. A unit of all pharmacists employed by Walgreen at its store located at 105 North McDowell Road, Petaluma, California, excluding all other employees, guards, and supervisors, as defined in the Act is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Charging Party has not been proved to represent a majority of employees in such appropriate unit within the meaning of Section 9(a) of the Act.

5. The Respondent has not refused to bargain with the Charging Party within the meaning of Section 8(a)(5) and (1) of the Act.

ORDER

I recommend an order that the complaint be dismissed in its entirety.