

**Tonnor Brothers Foods, Inc. d/b/a Big T Food Store and Retail Clerks Union Local 37, Retail Clerks International Association, AFL-CIO**

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**Allied Workers International Union and Retail Clerks Union Local 37, Retail Clerks International Association, AFL-CIO**

**Allied Workers Union Local 100, affiliated with Allied Workers International Union and Retail Clerks Union Local 37, Retail Clerks International Association, AFL-CIO. Cases 25-CA-4499, 25-CA-4617, 25-CB-1249, and 25-CB-1309**

November 22, 1972

## DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS  
AND KENNEDY

On April 28, 1972, Trial Examiner Wellington A. Gillis issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent Employer filed a brief in opposition to the exceptions of the General Counsel.

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 be, and it hereby is, dismissed in its entirety.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

WELLINGTON A. GILLIS, Trial Examiner: This case was tried before me on January 25 and 26, 1972, at Valparaiso, Indiana, and is based upon separate charges filed by Retail Clerks Union Local 37, Retail Clerks International Association, AFL-CIO, hereinafter referred to as Retail Clerks or Local 37, on August 26 and November 10, 1971,

against Tonnor Brothers Foods, Inc. d/b/a Big T Food Store, hereinafter referred to as the Respondent Employer, and on August 26 and November 5 against Allied Workers International Union, and Allied Workers Union Local 100, affiliated with Allied Workers International Union, respectively; upon the consolidated complaint issued on November 19, 1971, and amended on January 10, 1972, by the General Counsel for the National Labor Relations Board, hereinafter referred to as the Board, against the Respondent Employer and Respondent Unions, alleging violations of Section 8(a)(1), (2), and (3), and Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the National Labor Relations Act, as amended (61 Stat. 136), and upon timely answers filed by the Respondents denying the commission of any unfair labor practice.

At the hearing, all parties were represented by counsel, and were afforded full opportunity to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, and to engage in oral argument. The parties waived the filing of briefs and argued orally on the record.

Upon the entire record in this case, and from my observation of the witnesses, and their demeanor on the witness stand, and upon substantial, reliable evidence "considered along with the consistency and inherent probability of testimony" (*Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496), I make the following:

## FINDINGS AND CONCLUSIONS

### I. THE BUSINESS OF RESPONDENT EMPLOYER

Tonnor Brothers Foods, Inc. d/b/a Big T Food Store, a corporation with a place of business at Chesterton, Indiana, is engaged in the business of selling meat, groceries, and related items at retail. During the 12-month period immediately preceding the issuance of complaint, the Respondent Employer sold and distributed products, the gross value of which exceeded \$500,000, and during the same period of time, the Respondent received goods valued in excess of \$50,000 transported to the Chesterton store in interstate commerce directly from States other than the State of Indiana. The parties admit, and I find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE LABOR ORGANIZATIONS INVOLVED

The parties admit, and I find, that (a) Retail Clerks Union Local 37, Retail Clerks International Association, AFL-CIO, (b) Allied Workers International Union, and (c) Allied Workers Union Local 100, affiliated with Allied Workers International Union, are labor organizations within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Issue*

While the consolidated complaint, with specificity, charges the Respondent Company with conduct constituting unlawful assistance to the Respondent Local Union, involving the organizing of the Respondent's employees, the overriding issue presented by the pleadings, upon

which the case against both Respondents rises or falls, is whether Roy H. Thompson, assistant store manager and head of groceries, is a supervisor within the meaning of the Act.

### B. Facts

While the Respondent herein is incorporated, the business is in fact owned by Harold G. Tonnor, and his two silent partner brothers, Donald J. and George J. Tonnor, with Harold the company president and store manager.<sup>1</sup> A second store in Peoria, Illinois, was sold in December 1971, leaving the Chesterton store as the sole Respondent operation.

The Chesterton store has been owned by the Tonnor brothers since its purchase in 1961. Physically, it is small in size, operating with an average employee complement, excluding the meat department, of 16 employees, approximately 8 of whom are part-time high school students.<sup>2</sup> During the period here in question, August 1971,<sup>3</sup> and, on the payroll for the period ending August 7, the Respondent had in its employ under Tonnor, Roy Thompson, assistant manager and head of groceries, Orley Vern Cooley, head of produce, Richard Pawlak, head of frozen foods, Mary Ann Betz, head checker, and, in addition, 3 full-time checkers (cashiers), 2 part-time checkers, 6 part-time packers or stockboys, and an office girl.

During the summer of 1971, Thompson, concerned over recent indiscriminate firing in the store by Tonnor, discussed with Vern Cooley his uneasy feelings and the need for getting job security for themselves. In reply to Cooley's inquiry as to whether he knew of any union representative, Thompson spoke of Jack P. Baggett, business manager of Local 100 and president of the International, whom he had known for some 20 years. Apparently with Richard Pawlak's concurrence, Cooley contacted Baggett by telephone on August 2. Cooley told Baggett that they did not have a union at the store, that they were interested in an independent union, and asked Baggett to meet with him and Thompson. That evening, Baggett met with Thompson and Cooley, in the latter's apartment above the store.<sup>4</sup> They took union authorization cards from Baggett and said that they would get them signed. These were 3-part membership cards, with one part to be retained by the local Union, one part to be forwarded to the International, and a third, authorizing a checkoff, to be given to the Employer. Baggett told Thompson and Cooley that when they secured enough signed cards to call him and he would arrange a meeting.

Within the next day or two Thompson and Cooley passed out union cards to all the employees, Thompson telling each one individually that they were trying to organize the Union as protection against being fired and

that the employees would get a raise if they joined the Union.<sup>5</sup>

On August 5, Cooley called Baggett, indicating that he had 15 application cards signed. Baggett arranged to have a meeting with the employees that night at Cooley's apartment. At the 7:30 meeting, with a majority of the Respondent's employees in attendance, including Pawlak, Thompson and Cooley handed 15 cards over to Baggett, all bearing an August 5 date. The 16th, belonging to Cooley, had been misplaced, and, bearing an August 8 date, was subsequently turned over to the Union. Baggett then went over various aspects of a proposed contract, including the wage scale which provided all employees with increases. After a number of questions the employees unanimously agreed that Baggett should proceed to negotiate the contract with the Respondent Company.

During the day, August 5, prior to the meeting, assured by Cooley of an employee majority, Baggett had authorized his son, Jack David Baggett, president of Local 100, to send a letter to the Respondent requesting recognition. Tonnor received this letter the following day, August 6, and immediately called a meeting of his employees in the store.<sup>6</sup> Tonnor, upset over the matter, told his employees that he was very disappointed because of their calling a union in, that they had been getting along fine and he did not know that there were any problems, that they should have told him. He also told the employees that if he got together with the Union that they (the employees) as well as the store would have to abide by the contract.

After the meeting, still upset, Tonnor went back to his office and, around 3:30 p.m., called Baggett. Tonnor acknowledged receipt of the letter requesting recognition, requesting proof of his majority. Baggett told him he had 15 or 16 employees signed up, threatening a picket line if he did not execute a contract. Tonnor, desiring to avoid a picket situation such as he had gone through in 1961, agreed to recognize Local 100 and arranged to meet with Baggett on the morning of August 9.

On that occasion, with the younger Baggett and the union vice president, George Dorsey, also present, Baggett gave Tonnor the cards. After Tonnor examined them, he was presented with a contract, which contained a union-security clause. They went over the 3-year contract, paragraph by paragraph, making a few changes, at the conclusion of which, both parties signed. After its execution, Tonnor was left the dues-checkoff portion of the union authorization cards of the employees whose cards had been submitted.

Pursuant to the 15 employee checkoff authorizations, the Respondent commenced deducting union dues from employees' pay and transmitting them to the Union. Initiation fees were waived for employees who joined at this time. The Respondent, however, collected initiation

<sup>1</sup> As will appear later, the operation of the business is left entirely to Harold Tonnor, with the two brothers' participation limited to a monthly board meeting and to rare emergency situations.

<sup>2</sup> The four meat department employees, including the head meatcutter, Bill Kunst, are covered under a separate contract with the Amalgamated Meat Cutters Union and are not involved in this proceeding.

<sup>3</sup> Unless otherwise noted, all dates hereinafter set forth refer to 1971.

<sup>4</sup> Cooley rents this apartment from the Respondent for \$125 per month.

<sup>5</sup> Thompson approached employees Charles Poparad, Keith Fisher,

Richard Pawlak, Mary Ann Betz, Don Highsmith, Jeff Kohler, Paula Brindza, Sandra Thomas, Fred Alumbaugh, and Patricia Harvil.

<sup>6</sup> The letter, on Local 100 stationery, and addressed to Tonnor, stated, "Please be advised that the above union now represents the majority of your employees and that we expect to be contacted by you within the next twelve hours to negotiate a contract concerning wages, hours, and other fringe benefits. If we do not hear from you, pickets will be established at your store. If you want to see proof that we represent the majority of your employees, we have the necessary applications filed by your employees."

fees as well as dues for several new employees subsequently hired. Because of the filing of the charges herein and receiving notice from the Board, the Respondent, as of October 4, stopped the further deduction of union dues.

### Analysis and Conclusions

The complaint alleges, and the General Counsel asserts, that, because of the unlawful activity of Supervisors Thompson and Cooley in organizing the Respondent's employees, specifically, (a) in attending and participating in the August 5 union meeting, (b) in urging employees to attend the union meeting, (c) in soliciting on behalf of the Respondent Union employees to sign union authorization cards, (d) in securing from employees signed union membership cards and checkoff authorizations, resulting in the Company recognizing, and entering into a union-security contract with, a minority union, and thereafter unlawfully collecting dues and initiation fees, the Respondent Company and the Respondent Unions have violated Sections 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2) of the Act, respectively. In essence, the General Counsel's overall position, simply stated, is that the majority showing of the Union is tainted solely because of the personal involvement of Thompson and Cooley. It is quite clear that the General Counsel is not asserting collusion between the Company and the Respondent Union or that at the time there existed a *Midwest Pipe*<sup>7</sup> situation involving recognition requests by two unions. In fact, as to the former, it is apparent that Tonnor knew nothing of the activity until it had been a *fait accompli*, and, as to the latter, it is also apparent that the Charging Union's interest in the Respondent's employees commenced at some point of time subsequent to the uncontroverted events cited above.

Accordingly, as recognized by all, the real question here is whether the union activity among Respondent's employees was in fact bona fide activity of its employees or was prompted by the supervisory hierarchy, giving rise to the crucial determination as to the supervisory status of Thompson, Cooley, and Pawlak. While considering the issue as to all three, for reasons that will become apparent, it is Thompson, alone, upon whom the General Counsel must rely to prove his case.

From the outset, the evidence makes it abundantly clear that the management of this store is in the hands of one man, Harold Tonnor, from whom all direction flows. It is also apparent that the name of the store belies the fact, that, although operating along the lines of a modern day supermarket, it in fact is a small operation more closely resembling the traditional neighborhood grocery store. At the time of the events herein, the store hours were 8:30 a.m. to 9 p.m., Monday through Saturday, and 9 a.m. to 6 p.m. on Sunday. During the course of a normal workweek, Tonnor was physically present in the store every day of the week except Wednesday afternoon from the opening in the morning until 5:30 p.m., with Thompson and Pawlak alternating in staying late to close up the store. Pawlak, as head of frozen foods, was mainly responsible for that department by himself, with no other employee assigned to

work there. Cooley had the same responsibility for the produce department, with one part-time high school stock boy assisting when needed. Thompson, who was hired by Tonnor in 1969, "to help him run the store," while carrying the title of assistant manager, was mainly responsible for groceries. Assisting him in this capacity were five part-time stock boys, whose functions consisted of helping to stock the shelves, unloading trucks, packing bags, and performing other odd jobs around the store.

In carrying out their day-to-day duties in their respective sections, Cooley and Pawlak, often interchanging when necessary, signed for stock, unpacked and uncrated stock when it arrived, priced items, stocked the shelves, waited on customers, swept floors, and carried out garbage and refuse. Neither had authority over other employees. Apart from Pawlak's \$3.78 per hour wage and Cooley's commission of 12 percent of the gross sales of the produce department, there was little else connected with their positions in the store which is indicative of supervision.

Thompson, on the other hand, a man in his late fifties, was in charge of the store when Tonnor was not there, which, as indicated, was on Wednesday afternoons, and evenings after 5:30 p.m.<sup>8</sup> He was paid \$3.07 per hour plus a \$60 per week bonus, and had a desk, as did the office girl, in Thompson's office.

With respect to nonpersonnel functions, the record indicates that Thompson did just about everything from ordering stock for the shelves in the grocery department to cleaning out the restrooms. He worked alongside the stock boys unloading trucks, cleaning incinerators, mopping the floors, packing groceries, taking groceries out to autos, and going to the bank occasionally. While he, like a number of others, had a key to the store, and also possessed the safe combination, Thompson had no access to financial books or records, did not sign checks, and was not accountable for profit and loss within the store or the grocery department. In ordering stock, which was always checked by Tonnor, Thompson was limited to replenishing the shelves. He had no authority to add new products, to discontinue brands, or to set prices, all of which was done by Tonnor. Thompson estimated that during the course of his 44-hour week, roughly 37 hours were spent performing physical work and 7 hours devoted to making out grocery and produce orders.

With respect to personnel matters, the record reveals that Tonnor, and Tonnor alone, exercised the authority to hire, fire, promote and discipline employees. In the one instance where Thompson, in need of help, attempted to hire a person, Tonnor, the very next day, fired him, censuring Thompson severely as not having the authority to hire. As to Thompson's authority over the stock boys, it is apparent that such was pretty much limited to routine matters. Employee hours and work schedules were set by Tonnor and posted on the bulletin board. In the event that an employee wanted to switch hours, or to take a day off, deviating from these schedules, Thompson would convey the request to Tonnor, who, ascertaining from Thompson that there was someone to cover, would normally grant the change.

<sup>7</sup> *Midwest Piping and Supply Co. Inc.*, 63 NLRB 1060.

<sup>8</sup> Thompson was discharged shortly after the events herein, was rehired

through the efforts of the Union, and then, a few weeks later, voluntarily quit his employment.

While Thompson initialed timecard corrections and was responsible for making sure that stock boys were performing work in the grocery department, occasionally moving a boy from one task to another without consulting Tonnor, for the most part these boys had certain routine jobs to do and, after some initial direction from Thompson following their employment, needed no direct supervision from anyone. As noted above, more often than not, Thompson would work alongside these boys performing the same physical work as they. In the evenings, after Tonnor had left for home, always remaining on call within telephone reach of his store, Thompson, if a problem arose, would call Tonnor and get authority to do whatever was necessary, such as keeping a boy late to help unload a truck. On the one occasion during his 2-year tenure with the Respondent that Tonnor was absent for a few days and Thompson was left in charge, Tonnor, before leaving, had the payroll and remittance checks signed in advance, the work schedules set up, and sales items prearranged, leaving little, if anything, requiring independent judgment to Thompson.

Thus, it is quite apparent that Tonnor, who personally was on the floor all but 3 hours of every day, was the one person who supervised the entire running of the store, that, notwithstanding the unwritten title of assistant manager, Thompson was little more than a glorified stocker, as he, in his testimony, referred to himself, and that Thompson possessed no authority, nor was he looked upon by other employees as having authority, over any employee in the store, other than that, the exercise of which, was purely routine in nature.<sup>9</sup>

As Thompson, like Cooley and Pawlak, was not possessed with the authority required by Section 2(11) of the Act<sup>10</sup> as necessary to establish supervisory status, and thus to render the Respondent Company responsible for

<sup>9</sup> To the extent that a small portion of the testimony of stock boy Charles Poparad might possibly lead to a contrary inference, I credit Tonnor and Thompson, upon whom I rely for the findings herein.

<sup>10</sup> Sec. 2(11) of the Act provides that:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

his actions, I find that the conduct of Thompson, as well as that of Cooley and Pawlak, alleged in the complaint as unlawful, was in fact legitimate employee union activity, and that, as a result, the Respondent Company, in recognizing the Respondent Union and thereafter entering into a collective-bargaining contract, did in fact recognize the majority representative of its employees. In view of this determination, it follows, and I find, that the General Counsel has failed to prove by a preponderance of the credible evidence the allegations of the consolidated complaint against any of the Respondents. Accordingly, I shall recommend that the consolidated complaint against the Respondent Company in Cases 25-CA-4499 and 25-CA-4617, and against the Respondent Unions in Cases 25-CB-1249 and 25-CB-1309, be dismissed.

Upon the basis of the foregoing findings of fact and conclusions of law, I make the following:

#### CONCLUSIONS OF LAW

1. The Respondent Company, Tonnor Brothers Foods, Inc. d/b/a Big T Food Store, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent Unions, Allied Workers International Union, and Allied Workers Union Local 100, affiliated with Allied Workers International Union, are labor organizations within the meaning of Section 2(5) of the Act.
3. None of the Respondents has engaged in any unfair labor practices as alleged in the consolidated complaint.<sup>11</sup>

#### RECOMMENDED ORDER<sup>12</sup>

It is recommended that the consolidated complaint herein be dismissed in its entirety.

<sup>11</sup> That the record does not support a finding of a violation herein would appear to give rise to a just result as well, for it is less than desirable to upset a good collective-bargaining relationship where, as here, everyone, other than an outside union, is happy with that relationship, including the entire employee unit complement.

<sup>12</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 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.