

**Zayre Department Stores and United Food and Commercial Workers Union, Local 1444, as Chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC.**  
Case 30-CA-9355

July 26, 1988

**DECISION AND ORDER**

**BY CHAIRMAN STEPHENS AND MEMBERS  
JOHANSEN AND BABSON**

On April 3, 1987, Administrative Law Judge Lowell Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a limited exception and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.<sup>2</sup>

In his recommended remedy, the judge provided that the Respondent make whole its employees for any loss of wages or other employment benefits they may have suffered as the result of the Respondent's failure to sign the contract, plus interest. The judge further provided that the loss of earnings shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). We modify the judge's recommended remedy to provide that the loss of earnings shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest to be computed in the manner provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>3</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's decision, we find it unnecessary to rely on his statement at fn. 8 of his decision that the Respondent was insisting that nonunion members participate in the ratification vote.

Member Johansen notes that Sec. 8(d) defines the obligation "to bargain collectively." The failure to bargain collectively is made an unfair labor practice by Sec. 8(a)(5) and Sec. 8(b)(3).

<sup>2</sup> The General Counsel has requested that the Order include a visitatorial clause. Under the circumstances of this case, we find it unnecessary to include such a clause. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

<sup>3</sup> In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Zayre Department Stores, Racine, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

*Benjamin Mandelman, Esq.* and *Paul Bosanac, Esq.*, for the General Counsel.

*David E. Jarvis, Esq.* and *Lynn English, Esq.*, of Milwaukee, Wisconsin, for the Respondent.

*Scott D. Soldon, Esq.*, of Milwaukee, Wisconsin, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

LOWELL GOERLICH, Administrative Law Judge. The charges filed on 10 October 1986 by United Food & Commercial Workers Union, Local 1444, as chartered by United Food & Commercial Workers International Union, AFL-CIO-CLC (the Union) was served on Zayre Department Stores (the Respondent) by certified mail on the same date. The first amended charge filed by the Union on 14 October 1986 was served on the Respondent on the same date. A complaint and notice of hearing was issued on 6 November 1986. The complaint, among other things, alleges that the Respondent since 23 September 1986 has failed to execute a written agreement with the Union in violation of Section 8(a)(1) and (5) of the National Labor Relations Act.

The Respondent filed a timely answer in which it denied that it had engaged in the alleged unfair labor practices.

This case came on for hearing in Milwaukee, Wisconsin, on 27 and 28 January 1987. Each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions of law, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

**FINDINGS OF FACT**

**I. THE BUSINESS OF THE RESPONDENT**

At all times material, the Respondent, a Delaware corporation with offices and places of business located in Racine, Wisconsin, has been engaged in the operation of general merchandise retail stores throughout the United States and operates two such stores located in Racine, Wisconsin.

During the past calendar year, a representative period, the Respondent, in the course and conduct of its business operations described above, received gross revenues in excess of \$500,000, and during the same period, purchased and received goods valued in excess of \$50,000 from points located directly outside the State of Wisconsin.

The Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

The parties stipulated that a petition for an election was filed 12 July 1983. An election was conducted on 23 September 1983 to which exceptions were filed by the Respondent. Thereafter the Board issued a Decision and Certification of Representative on 21 March 1984 certifying the Union as the bargaining agent. The Respondent refused to bargain. A complaint was issued that culminated in a bargaining order on 28 September 1984 in 272 NLRB No. 84 (unpublished). On 16 August 1985, the United States court of appeals enforced the Board's order.

Thereafter, commencing on 22 October 1986 and concluding on 23 July 1986, the Union and the Respondent met in negotiation sessions. At the 23 July 1986 session, the Respondent presented the Union, as a final offer, a complete written contract except for the duration clause. The omission was supplied by the Respondent orally. The contract offer was for a period of 3 years to commence on the date of the signing of the contract. Irving Ritz, vice president of labor relations, was the spokesman for the Respondent during the negotiations and Paul Whiteside Jr. was the spokesman for the Union. Although the subject of contract ratification had not been discussed at any of the prior bargaining sessions, including the 23 July 1986 session, Ritz insisted that at the 23 July 1986 session he stated to the union representatives that "we were prepared to sign the agreement subject to acceptance or ratification by the employees."<sup>1</sup> According to Ritz, "There was no direct response, no objection, no grunts, no nods . . . until the end of the contract negotiations at which time they said the contract isn't acceptable to us, but we will take it to a vote." Whiteside denied that the Respondent had proposed as a condition precedent to the execution of the proffered contract ratification by the employees.<sup>2</sup>

At the 23 July 1986 bargaining session the Union reviewed the contract offer and, according to Whiteside, after discussion with the Respondent's representatives,

the following subjects had not been resolved: union security, probationary period, seniority, polygraph, wages, and term of the contract. At the close of the session the Respondent was advised that the union representatives present would not recommend acceptance of the proposed contract but would, nevertheless, submit the contract to a ratification vote.<sup>3</sup> As testified by Ritz, "At the very end of negotiations, the Union said we cannot accept this contract, but we will take it to a vote." Prior to the conclusion of the 23 July 1986 session, arrangements were agreed on whereby the Union could use the Respondent's bulletin board to announce a ratification meeting.

Notices were posted as agreed. A ratification meeting was scheduled on 3 September 1986 at the union hall.<sup>4</sup> The ratification meeting occurred as scheduled. At this meeting the union conferees at the negotiating session reversed their position and recommended acceptance of the proposed contract. Whiteside made the recommendation. Nevertheless, the contract was rejected; a strike vote was taken, which failed to pass.

Ritz heard of the contract rejection the next day through one of the store managers.

Neither the Respondent nor the Union communicated with each other in respect to the status of the proposed contract until 19 September 1986, when the Respondent received the following mailgram from the Union dated 18 September 1986:

In accordance with Article 23, Section D6 of the USCW International Constitution Local 1444 has ratified your final proposal as presented in the messages on 7-23-86. Accordingly, we will be preparing copies of the Labor agreement for your signature.<sup>5</sup>

By letter dated 18 September 1986, the Union sent the following message:

This is a follow-up to our mailgram of September 17, 1986. The Western Union operator somehow made several errors in the message, which should have read:

<sup>3</sup> The Union's International constitution, art 23, sec. D3, required that an employer's final offer be submitted to the affected membership.

The proposal judged by the President of negotiating committee to be the employer's final proposal for a collective bargaining contract or renewal of an existing contract shall be submitted to the affected membership for its consideration. A majority vote of those present and voting shall be necessary to accept or reject the proposal.

<sup>4</sup> Daniel Welch, president of the Union, testified that the ratification meeting was delayed because it "was a heavy vacation period and a work period for us" and that "we wanted to consult with our International Union."

<sup>5</sup> Art 23, sec D6, provides:

In the event of rejection of the employer's proposal judged by the Local Union President of negotiating committee to be the employer's final proposal for a collective-bargaining contract or renewal of an existing contract and the failure of the affected membership of the Local Union to approve a strike or other economic action by a two-thirds vote, the Local Union Executive Board shall, after notifying the International President and receiving acknowledgement of such notice, have authority to accept or reject such offer.

<sup>1</sup> Ritz' demand is sometimes referred to at the "employee ratification" or "ballot clause."

<sup>2</sup> Had the Union agreed to Ritz' alleged proposition it would have violated the Union's constitution, which required an employer's final offer to be submitted to membership of the Union not the employees of the employer (See *infra*)

In accordance with Article 23 Section D-6 of the *UFCW International Constitution, Local 1444 has ratified your final proposal as presented and amended* on July 23, 1986. Accordingly, we will be preparing copies of the labor agreement for your signature.

The corrections are [italicized] and should clarify our previous communications. You should receive the contracts for signature in about two weeks.

Another letter dated 19 September 1986 followed:

This letter should serve as additional notice that Local #1444 has accepted your final proposal as presented on 7/23/86.

Attached is a signed copy of that document by the officers of Local #1444.

We will be forwarding copies of the labor agreement for your signature.

A final letter dated 23 September 1986 contained the following language:

Please find enclosed four (4) copies of the labor agreement covering your two (2) Racine stores.

Please sign and return two (2) copies to this office.

The Respondent answered by a letter dated 29 September 1986.

At the last collective bargaining meeting between us on July 23, 1986, you specifically stated that the contract then on the table was unacceptable to the Union, and though you couldn't recommend it, you would present it to the employees for a vote. It is our understanding that the employees also rejected the contract by majority vote on September 3, 1986. These facts clearly indicate that there was never a meeting of the minds, a requisite element for a contract, nor was there a lawful ratification by the Union or the employees. It is my belief, therefore, that it would be improper for me to affix my signature to the four copies of the contract which you have sent to me for that purpose. Under these circumstances, I am returning all copies to you herewith.

Ritz agreed that "[w]hat the Union said they were going to submit to the membership for ratification was a complete proposal"—on the part of the Company, "[a] three year agreement . . . [f]rom the date of signing." Ritz was unaware of the Union's constitutional provision that permitted acceptance of a final proposal after rejection of the contract by the membership and the loss of a strike vote; nor was this information imparted to the Respondent by the Union. At no time has the Respondent withdrawn its final offer. Ritz explained why the Respondent did not sign its final offer:

Well because I didn't feel that we had had a meeting of the minds in view of the fact that, number one, we had offered the contract subject to ratification by the employees and I was under the

impression at the end of the agreement that the Union understood that when they said we can't accept it, but we will take it to a vote . . . there was no meeting of the minds because there was no ratification.

Ritz also explained why the Respondent had insisted that "employees favorably ratify the vote before the company would sign it":

It was our impression that the Union had enticed [sic] employees to vote for them by making promises of more than what they were currently receiving and whatever resulted from the contract negotiations, our employees were going to have to live with and we were concerned about morale and we wanted them to be the ones who had the ability to determine whether or not they could live or wanted to live with the contract proposal.

Further, it would appear from the credible evidence in this case that, because the Respondent had never withdrawn its final offer, the acceptance of its final offer by the Union would have resulted in a meeting of the parties' minds as to all the provisions of the written offer 23 July 1986, including the duration clause that the Respondent orally offered. Not so, contends the Respondent, for it had imposed a condition precedent, a barrier so to speak, that had to be surmounted before there could be a meeting of the minds. This barrier was the "employee ratification" or "ballot clause." The Respondent's insistence on this barrier was unlawful because it concerned a matter without the scope of mandatory bargaining. "[I]t is unlawful to insist upon matters within the scope of mandatory bargaining and *unlawful to insist upon matters without.*" (Emphasis added.) *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Additionally, in the *Borg-Warner* case, *supra*, the Supreme Court teaches that a ballot clause, such as the one in the instant case, was not a matter that fell within the scope of mandatory bargaining and that insistence by an employer thereon as a condition precedent to the consummation of an agreement was unlawful.<sup>6</sup>

To allow the Respondent to dictate the method of acceptance of its offer and insist thereon would deny the Union rights given to it by statute, for it would result in the consummation of an agreement with other than the statutory representative with which the Employer was required to bargain. As was said by Justice Harlan in his concurring decision in *Borg-Warner*, *supra* at 362:

The employer's duty to bargain with the representatives includes not merely obligation to confer in good faith, but also ". . . the execution of a written contract incorporating any agreement reached if requested . . ." by the employees' representatives. § 8(d). I think its hardly debatable that this language must be read to require the company, if so

<sup>6</sup> The "ballot clause" in *Borg-Warner*, 356 U.S. 342, 345 fn. 3, read in part, "all employees in the bargaining unit to vote, by secret, impartially supervised, written ballot, on whether to accept or reject the Company's last offer, and on any subsequent offers made."

requested, to sign any agreement reached with the same representative with which it is required to bargain. [Emphasis added.]

The Employer's stance in this case not only frustrates the objectives of good-faith collective bargaining but also affords the Employer a means by which it can avoid its obligations under Section 8(d) of the Act and dictate the Union's internal regulations as they pertain to the acceptance of a labor agreement.<sup>7</sup> Obviously, this may not be allowed.

The case of *Southland Dodge*, 205 NLRB 276, 279 (1973), disposes of the issues before me:

Because an employer may not insist on a ratification of a collective-bargaining agreement by a "majority of its employees" (See *Wooster Division of Borg-Warner Corporation v. NLRB*, 356 U.S. 342 (1958)) the Respondent's refusal to execute a "written contract" upon the request of the Union constituted a breach of the Respondent's duty to bargain collectively within the meaning of Section 8(d) of the Act. [See also *C & W Lektra Bat Co.*, 209 NLRB 1038, 1040 (1974).]

I find that the Respondent's insistence on the "employee ratification" or "ballot clause" and its refusal to sign an otherwise satisfactory agreement because such "employee ratification" or "ballot clause" was not complied with was in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act.

In view of my finding and conclusions, no useful purpose will be served by my determination whether White-side or Ritz lied about Ritz' presentation of the "employee ratification" clause at the 23 July 1986 bargaining session. For the same reason, the defenses raised by the Respondent in its brief are immaterial or are not well taken because they do not conform with the facts as found above.<sup>8</sup>

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act for jurisdiction to be exercised here.

<sup>7</sup> "[I]t is for the union and not the employer, to construe and apply its internal regulations relating to what would be sufficient to amount to ratification." *M & M Oldsmobile*, 156 NLRB 903, 905 (1966)

<sup>8</sup> The credible evidence established that the Respondent did not refuse to sign the contract because its offer had expired or had been withdrawn, or because of a mutual misunderstanding, or because the Union had insisted on a termination date of 16 September 1989 (The mailgram acceptance was dated 18 September 1986 and was received by the Respondent on 19 September 1986) It was the acceptance of the Respondent's offer as presented at the bargaining session of 23 July 1986, which became the parties contract

This contract was rejected by the Respondent solely (as expressed by Ritz "there was no meeting of the minds because there was no ratification") because, although the contract had been accepted by the Union, it had not been accepted by the employees. In its brief the Respondent puts it this way "The Company's refusal to sign is based on its contention that no meeting of the minds occurred because the Company's obligation to agree was conditioned on a favorable employee ratification vote which never occurred" Thus it is also clear that the Respondent was also insisting that nonunion members participate in the ratification vote

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

3. The following unit constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All regular, full-time and regular, part-time selling and non-selling employees, and employees in all leased departments of the Employer at its two stores located at 4101 Durand Avenue and 2210 Rapids Drive, Racine, Wisconsin; excluding all other employees, casual employees, seasonal employees, all leased department managers, confidential employees, professional employees, guards and supervisors as defined in the Act.<sup>9</sup>

4. The Union has been at all times material the exclusive representative of the employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By insisting that it would not sign its proposed labor agreement unless the employees in the appropriate unit ratified it, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. By unlawfully failing and refusing to execute a written contract embodying the terms and conditions of the agreement reached with the Union, as found, the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

#### THE REMEDY

It is recommended that the Respondent cease and desist from its unfair labor practices and take certain affirmative action deemed necessary to effectuate the purposes of the Act. It is further recommended that the Respondent sign the collective-bargaining agreement marked General Counsel's Exhibit 12(b); that it give effect to such written contract retroactively to 20 September 1986;<sup>10</sup> that it continue the contract in effect for 3 years after 20 September 1986; and that it make whole its employees for any loss of wages or other employment benefits they may have suffered as the result of the Respondent's failure to sign the contract, plus interest. The loss of earnings, if any, under the recommended Order shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

<sup>9</sup> The Respondent admitted the appropriate unit. The appropriate unit and the unit described in the contract are the same

<sup>10</sup> The date of 20 September 1986 is chosen because it is the first date a signed copy of the agreement was submitted to the Respondent

<sup>11</sup> If no exceptions are filed as provided by Sec 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

## ORDER

The Respondent, Zayre Department Stores, Racine, Wisconsin, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Failing and refusing to sign the written contract containing the Respondent's proposal of 23 July 1986.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Forthwith sign the contract, containing the Respondent's proposal of 23 July 1986 to remain in effect for 3 years following 20 September 1986.

(b) On execution of the aforesaid agreement, give retroactive effect to the provisions thereof, make whole its employees for any losses they may have suffered by reason of the Respondent's failure to sign the agreement in the manner set forth in the remedy section.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Racine, Wisconsin establishment copies of the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Re-

spondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

## APPENDIX

NOTICE TO EMPLOYEES  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to sign the written contract containing our proposal of 23 July 1986.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL forthwith sign a written contract with United Food & Commercial Workers Union, Local 1444, as chartered by United Food & Commercial Workers International Union, AFL-CIO-CLC effective 20 September 1986 for a period of 3 years.

WE WILL give retroactive effect to the terms and conditions of the contract and WE WILL make whole our employees for any losses they may have suffered by reason of our failure to sign the contract, plus interest.

ZAYRE DEPARTMENT STORES

<sup>12</sup> If 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 read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."