

**Reichart Furniture Company and Retail Clerks Union,  
Local No. 1059 affiliated with Retail Clerks International Union, AFL-CIO. Case 8-CA-11406**

September 29, 1978

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

Upon a charge filed on October 4, 1977, by Retail Clerks Union, Local No. 1059, affiliated with Retail Clerks International Union, AFL-CIO, herein called the Union, and duly served on Reichart Furniture Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint and notice of hearing on November 7, 1977, 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 an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 30, 1977, following a Board election in Case 8-RC-10835, 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 September 6, 1977, 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. Thereafter, on November 14, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 21, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, with exhibits attached. Subsequently, on March 3, 1978, 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 response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 8-RC 10835, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent admits the request and refusal to bargain. It, however, contends that the certification of the Union in the underlying representation proceeding is invalid.

Our review of the record herein, including the record in Case 8-RC-10835, reveals that pursuant to a Stipulation for Certification Upon Consent Election an election was conducted on April 8, 1977, among the employees in the stipulated unit. The tally of ballots furnished the parties showed that of approximately 24 eligible voters, 15 voted for the Union, 9 voted for Independent Furniture Workers of the Ohio Valley or Tri-State Area, the Intervenor, and none voted for neither labor organization. Thereafter, Respondent filed timely objections to the election. The objections alleged, in substance, that the Board agent conducting the election improperly created the impression that the Intervenor was acting in violation of the law; the Union made misrepresentations and sought to mislead the employees, concerning its by-laws and whether Respondent's profit-sharing plan was on file with the appropriate Federal agency; the Union threatened and harassed employees; and employees threatened to file "charges" with the Union against other employees who supported the Intervenor. In addition, Respondent included a catchall objection in support of which it submitted a letter sent by the Union to employees offering to waive initiation fees. On May 13, 1977, the Regional Director issued his Report on Objections in which he found that the objections raised no substantial or material issues of either fact or law with respect to the election and that they were without merit. Accordingly, he recommended that the objections be overruled in their entirety and a Certification of Representative be issued in favor of the Union.

On May 17, Respondent filed a Freedom of Information Act request with the Regional Director to provide it with "all affidavits or statements, and any documents incorporated by reference therein, and all other evidence obtained during his investigation," and in a separate letter of the same date, requested the same material from the Regional Director. On May 20, the Regional Director denied Respondent's requests. Thereafter, Respondent appealed the Regional Director's denial of its requests to the General Counsel in Washington, D.C. On June 6, the Board's

Assistant Executive Secretary denied Respondent's request for an additional extension of time to supplement its exceptions to the Regional Director's report pending disposition of its appeal to the General Counsel. On June 13, the General Counsel denied Respondent's appeal.

Meanwhile, Respondent filed timely exceptions to the Regional Director's report in which it contended, *inter alia*, that the record should include all evidentiary items compiled by or submitted to the Regional Director during the course of the investigation of Respondent's objections and that a hearing was warranted. On June 15, Respondent filed with the Board a motion to supplement the record in which it requested that the Regional Director be ordered to forward to the Board "all statements, affidavits and other evidence, documents or otherwise" obtained during the investigation of the objections to the election. On August 30, the Board issued its Decision and Certification of Representative,<sup>2</sup> in which it adopted the Regional Director's findings and recommendations. The Board also referred to the various actions taken by the Regional Director, the General Counsel, and the Associate Executive Secretary with respect to Respondent's requests concerning the evidence obtained during the Regional Director's investigation of the objections and specifically denied as lacking in merit Respondent's motion to supplement the record.

On October 31, Respondent filed a motion for reconsideration requesting that the Board reconsider its decision, revoke the certification, and direct a hearing based on alleged newly discovered evidence. In support of its motion it submitted the affidavits of 3 employees in which they asserted that the Union misrepresented pension eligibility requirements, and a petition, purportedly signed by 13 of the approximately 24 unit employees, in which they asserted that the Union misrepresented itself and requested that the Board set aside the election. Thereafter, on April 21, 1978, Respondent filed an amendment to motion for reconsideration requesting the Board to consider as newly discovered evidence a letter, dated March 14, 1978, sent to the Board's Associate Executive Secretary and purportedly from Respondent's employees to the Union's president which, *inter alia*, requested that the Union withdraw its claim of representation.

On July 19, 1978, the Board issued its order denying motion in which it denied Respondent's motion for reconsideration.<sup>3</sup> Therein, the Board held that through its motion for reconsideration Respondent was seeking to file new objections some 7 months after the election and 2 months into the certification year and that it would be an unwise exercise of the

Board's discretion to permit a party to file new objections for an indefinite time after an election.

In its answer to the complaint and response to the Notice To Show Cause, Respondent argues that the Union's certification was improper on the basis of Respondent's objections to the election. It further argues that it was denied due process by the Board's failure to conduct a hearing on its objections, the denials of its requests that the Regional Director provide it with evidence obtained during the course of his investigation of the objections, and by the Board's denial of its motion that the Regional Director be ordered to forward such evidence to the Board for its consideration in the underlying representation proceeding. Finally, Respondent contends that the newly discovered evidence which it submitted to the Board in support of its motion for reconsideration warrants a denial of the Motion for Summary Judgment. It thus appears that Respondent is attempting in this proceeding to relitigate issues which were fully litigated and finally determined in the representation proceeding.

It is 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>4</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein, which it has not previously raised before the Board and which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

In this proceeding Respondent contends that due process entitles it to a hearing on its objections to the election. Prior to adopting the findings and recommendations of the Regional Director's Report on Objections, the Board considered the report, the Employer's exceptions thereto, and the entire record in that case. By its adoption of the report recommending that the Employer's objections be overruled, the Board necessarily found that the objections raised no substantial or material issues warranting a hearing.<sup>5</sup> Further, it is well established that the parties do not

<sup>4</sup> See *Pittsburg Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

<sup>5</sup> *Madisonville Concrete Co., A Division of Corum & Edwards, Inc.*, 220 NLRB 668 (1975); *Evansville Auto Parts, Inc.*, 217 NLRB 660 (1975).

Member Truesdale agrees with the disposition of the alleged misrepresentations involved in the Board's Decision and Certification of Representative inasmuch as in his opinion such alleged misrepresentations would not warrant setting aside the election under any view of the law.

<sup>2</sup> Not reported in volumes of Board decisions.

<sup>3</sup> 236 NLRB No. 221 (1978), Member Jenkins dissenting.

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 it is entitled to an evidentiary hearing. It is clear that, absent arbitrary action, this qualified right to a hearing satisfies the constitutional requirements of due process.<sup>6</sup> Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

Respondent, a West Virginia corporation, with its principal offices located at First and Hanover Streets, Martins Ferry, Ohio, is engaged in the retail sale of furniture. In the course and conduct of its business operations, Respondent annually derives gross revenues in excess of \$500,000 and ships from its Martins Ferry, Ohio, facility directly to points located outside the State of Ohio, products valued in excess of \$5,000.

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

Retail Clerks Union, Local No. 1059, affiliated with Retail Clerks International Union, AFL-CIO, 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 Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and part-time drivers, senior refinishers, refinishers, warehousemen, helpers, and apprentice employees at the Employer's central service facility at First and Hanover Streets,

Martins Ferry, Ohio; excluding all other employees, all office clerical employees and all professional employees, guards and supervisors as defined in the Act.

##### 2. The certification

On April 8, 1977, 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 8, 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 August 30, 1977, 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 September 1, 1977, and continuing to date, the Union has requested, and is requesting, 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 September 6, 1977, and continuing at all times thereafter to date, 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 Respondent has, since September 6, 1977, 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

<sup>6</sup> *GTE Lenkurt, Incorporated*, 218 NLRB 929 (1975); *Heavenly Valley Ski Area, a California Corporation, and Heavenly Valley, a Partnership*, 215 NLRB 734 (1974); *Amalgamated Clothing Workers of America [Winfield Manufacturing Company, Inc.] v. N.L.R.B.*, 426 F.2d 818, 828 (C.A.D.C., 1970).

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 (1962); *Commerce Company, d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (C.A. 5, 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### CONCLUSIONS OF LAW

1. Reichart Furniture Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Clerks Union, Local No. 1059 affiliated with Retail Clerks International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and part-time drivers, senior refinishers, refinishers, warehousemen, helpers, and apprentice employees at the Employer's central service facility at First and Hanover Streets, Martins Ferry, Ohio; excluding all other employees, all office clerical employees and all professional employees, guards and 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 August 30, 1977, 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 September 6, 1977, and at all times material thereafter, to bargain collectively with the above-named labor organization as 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 the Respondent, Reichart Furniture Company, Martins Ferry, Ohio, 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 Retail Clerks Union, Local No. 1059, affiliated with Retail Clerks International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and part-time drivers, senior refinishers, refinishers, warehousemen, helpers, and apprentice employees at the Employer's central service facility at First and Hanover Streets, Martins Ferry, Ohio; excluding all other employees, all office clerical employees and all professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of 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 Martins Ferry, Ohio, facility copies of the attached notice marked "Appendix."<sup>7</sup> Copies of said notice, on forms provided by the Regional Director for Region 8, 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

<sup>7</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 read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 8, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

MEMBER JENKINS, dissenting:

For the reasons expressed in my dissent at an earlier stage of this case, (236 NLRB 1698 (1978)), I would not grant the Motion for Summary Judgment.

#### 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 Retail Clerks Union, Local No. 1059 affiliated with Retail Clerks International Union, AFL-CIO, 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 National Labor Relations 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 full-time and part-time drivers, senior refinishers, refinishers, warehousemen, helpers, and apprentice employees at the Employer's central service facility at First and Hanover Streets, Martins Ferry, Ohio; excluding all other employees, all office clerical employees and all professional employees, guards and supervisors as defined in the Act.

REICHART FURNITURE COMPANY