

**Hook Drugs, Inc. and Local No. 725, a/w Retail Clerks International Association (AFL-CIO).** Case 25-CA-7214-2

January 14, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS FANNING  
AND JENKINS

Upon a charge filed on July 15, 1975, by Local No. 725, a/w Retail Clerks International Association (AFL-CIO), herein called the Union, and duly served on Hook Drugs, Inc., herein called the Respondent, the Acting General Counsel of the National Labor Relations Board, by the Regional Director for Region 25, issued a complaint on August 27, 1975, 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 June 24, 1975, following a Board election in Case 25-RC-5883 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 June 24, 1975, and more particularly on June 26 and July 11, 1975, 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. On September 3, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 8, 1975, counsel for the Acting General Counsel filed directly with the Board a motion to strike portions of Respondent's answer and a Motion for Summary Judgment. On October 15, 1975, the Respondent filed its answer opposing the Acting General Counsel's motion to strike and the motion for Summary Judgment, and its own motion to strike

and Motion for Summary Judgment. On October 20, 1975, the Respondent filed a supplemental motion for hearing. Subsequently, on October 22, 1975, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the Acting General Counsel's Motion for Summary Judgment should not be granted. Both the Acting General Counsel and Respondent thereafter filed responses to Notice To Show Cause.

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.

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

Ruling on the Motions for Summary Judgment

In its answer to the complaint, motion to strike, Motion for Summary Judgment, and supplemental motion for hearing, and in its response to the Notice To Show Cause, Respondent in effect admits the underlying representation proceeding in Case 25-RC-5883 but denies the validity of the Union's representative status, contending that its objections to the election had been erroneously overruled without a hearing on the material and substantial issues of fact raised thereby. The Acting General Counsel contends that Respondent is merely raising issues which were considered and resolved in the prior representation case, and this it may not do. We agree.

Review of the record herein, including the record in Case 25-RC-5883, reveals that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on February 21, 1975, which the Union won. The tally of ballots was 96 for the Union, 94 against. Respondent filed timely objections alleging, in substance, that the Union coerced Respondent's employees and interfered with their free choice (1) by paying prize money to induce attendance at organizational meetings, (2) by various misrepresentations, including those concerning the consequences of electing the Union, the reasons for union fines, the results of a 1970 election among Respondent's employees, and that the Union's efforts secured issuance of a complaint against Respondent, and (3) by the last-minute use of the official notice of election and ballot in union campaign material to indicate Board endorsement of the Union.

After investigation, the Regional Director on April 4, 1975, issued his report in which he recommended that Respondent's objections be overruled in their entirety. Respondent filed timely exceptions to the Regional Director's report, together with a support-

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 25-RC-5883, 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), enf'd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd. 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), enf'd. 397 F.2d 91 (C.A. 7, 1968), Sec 9(d) of the NLRA.

ing brief in which Respondent reiterated its objections and alternatively requested a hearing if there were substantial and material issues of fact. The Board on June 24, 1975, after reviewing the record in light of Respondent's exceptions and brief and finding that the Respondent's exceptions raised no material or substantial issues of fact or law warranting reversal of the recommendations or requiring a hearing, adopted the Regional Director's findings and recommendations overruling Respondent's objections in their entirety and certified the Union. It thus appears that the Respondent is attempting to raise issues, including that of a hearing on issues raised by its objections, which had been raised and resolved in the prior representation case.

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 re-litigate issues which were or could have been litigated in a prior representation proceeding.<sup>2</sup>

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and 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 would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, deny the Respondent's Motion for Summary Judgment and Supplemental Motion for Hearing and grant the Acting General Counsel's Motion for Summary Judgment.<sup>3</sup>

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

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE RESPONDENT

Respondent is an Indiana corporation with its

principal office and place of business at Indianapolis, Indiana, and various other facilities in the State of Indiana, including a warehouse at 2800 Enterprise Street, Indianapolis, Indiana, and is and has been at all times material herein, engaged at said facilities in the retail sale and distribution of drugs and related products. During the past year, a representative period, the Respondent, in the course and conduct of its business operations, sold and distributed products, the gross value of which exceeded \$500,000, of which goods and materials valued in excess of \$50,000 were transported to said facilities directly from States other than the State of Indiana.

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

Local No. 725, a/w Retail Clerks International Association (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 the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All warehouse employees working at the Respondent's 2800 Enterprise Street, Indianapolis Indiana, warehouse, including all housekeepers, all porters, all maintenance employees, all warehouse truckdrivers, and all warehouse clerical employees; but excluding all food service employees, all food service vendor drivers, all food service hostesses, all office clerical employees, all guards, and supervisors as defined in the Act, and all other employees.

###### 2. The certification

On February 21, 1975, 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 25, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as

<sup>2</sup> See *Pittsburgh 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>3</sup> Having granted the Acting General Counsel's Motion for Summary Judgment, we find it unnecessary to pass upon his motion to strike portions of Respondent's answer. The Respondent also filed a motion to strike from the Acting General Counsel's consolidated motion all reference to other cases pending between these parties because of their lack of relevancy to the technical refusal to bargain herein. We note that both parties are in effective agreement that other pending cases are irrelevant to the resolution of this case, especially as the Acting General Counsel alleges that his purpose in mentioning these cases was only to advise the Board of pending cases in light of the salutary Board policy of avoiding multiple litigation. In these circumstances, and since we have not considered these cases in the resolution of the instant proceeding, we deny Respondent's motion to strike.

the collective-bargaining representative of the employees in said unit on June 24, 1975, 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 June 24, 1975, and at all times thereafter, the Union has requested the 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 June 24, 1975, and continuing at all times thereafter to date, the 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 the Respondent has, since June 24, 1975, 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 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 57 (C.A. 10, 1965).

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

#### CONCLUSIONS OF LAW

1. Hook Drugs, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local No. 725, a/w Retail Clerks International Association (AFL-CIO), is a labor organization within the meaning of Section 2(5) of the Act.

3. All warehouse employees working at the Respondent's 2800 Enterprise Street, Indianapolis, Indiana, warehouse, including all housekeepers, all porters, all maintenance employees, all warehouse truckdrivers, and all warehouse clerical employees; but excluding all food service employees, all food service vendor drivers, all food service hostesses, all office clerical employees, all guards, and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 24, 1975, 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 June 24, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in 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 Respondent Hook Drugs, Inc., Indianapolis, Indiana, 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 Local No. 725, a/w Retail Clerks International Association (AFL-CIO), as the exclusive bargaining representative of its employees in the following appropriate unit:

All warehouse employees working at the Respondent's 2800 Enterprise Street, Indianapolis, Indiana, warehouse, including all housekeepers, all porters, all maintenance employees, all warehouse truckdrivers, and all warehouse clerical employees; but excluding all food service employees, all food service vendor drivers, all food service hostesses, all office clerical employees, all guards, and supervisors as defined in the Act, and all other employees.

(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 2800 Enterprise Street, Indianapolis, Indiana, warehouse copies of the attached notice marked "Appendix."<sup>4</sup> Copies of said notice, on forms provided by the Regional Director for Region 25, 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 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 25, in

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

<sup>4</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."

## 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 Local No. 725, a/w Retail Clerks International Association (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 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 warehouse employees working at the Respondent's 2800 Enterprise Street, Indianapolis, Indiana, warehouse, including all housekeepers, all porters, all maintenance employees, all warehouse truckdrivers, and all warehouse clerical employees; but excluding all food service employees, all food service vendor drivers, all food service hostesses, all office clerical employees, all guards, and supervisors as defined in the Act, and all other employees.

HOOK DRUGS, INC.