Alpert's, Inc. *and* **International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 392.** Case 8-CA-14914

15 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 30 September 1982 Administrative Law Judge Irwin H. Socoloff issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[1] findings, and conclusions of the Administrative Law Judge 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 Administrative Law Judge and hereby orders that the Respondent, Alpert's, Inc., Seekonk, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] At the hearing, Respondent objected to the Administrative Law Judge's refusal to sequester witnesses on a motion made by Respondent after the General Counsel's second witness had completed his testimony. Such determination whether witnesses should be excluded from the hearing after testimony has been heard is a matter within the discretion of the Administrative Law Judge. We find no abuse of discretion here, as Respondent has not offered to demonstrate the manner in which the ruling prejudiced its case. See *Local Union 633, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (B & W Construction Company)*, 249 NLRB 67 (1980).

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge: Upon a charge filed on June 12, 1981, by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 392, herein referred to as the Union, against Alpert's, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint dated July 30, 1981, alleging violations by Respondent of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Cleveland, Ohio, on June 14 and 15, 1981, at which the General Counsel, the Charging Party, and Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in this case, and from my observations of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation engaged in the business of retail furniture sales at stores located in the Cleveland, Ohio, area. Annually, it derives gross revenues in excess of $500,000 from the operation of the Cleveland area stores, and receives, at said stores, goods and materials valued in excess of $5000 which are sent directly from points located outside the State of Ohio. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

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

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Until April 1981, Name Brand, Inc., owned and operated eight retail home furniture stores in the northeast Ohio area. In 1979, it voluntarily recognized the Union as the exclusive collective-bargaining representative of its regular full-time warehousemen and finishers employed at the aforementioned stores. Recognition was granted after the Union presented to Name Brand authorization cards purportedly signed by a majority of the warehousemen and finishers. A formal card check was not conducted. Thereafter, the parties entered into a collective-bargaining agreement, effective from January 2, 1980, until June 1, 1982.

On or about April 1, 1981, Respondent purchased the assets of Name Brand, Inc., at the eight northeast Ohio stores. On that date, at a meeting of the 20 warehousemen and finishers then working for Name Brand, a representative of that company informed the unit employees that they were terminated. At the same meeting, a representative of Respondent told the gathered workers that they were all hired by Alpert's and that they would keep their seniority "and everything would stay the same." At the end of the meeting, the employees returned to work. While, immediately thereafter, the stores were closed to the public for a period of 3 days, there was no interruption of employment for the bargaining unit employees. Nor, for some time, did Respondent hire any additional warehousemen or finishers. Rather, it began operation of

a retail home furniture business at the eight locations with the same 20 warehousemen and finishers previously utilized by Name Brand. Respondent opened for business under the name "Alpert's Name Brand" and offered for sale to the public substantially the same products formerly sold by Name Brand. The unit employees were kept at their former locations and received the same wages and benefits as they had previously enjoyed. Some 2 months later, Respondent ceased to hold itself out to the public as "Alpert's Name Brand" and, thereafter, utilized the Alpert's, Inc., name only.

On April 10 and, again, on April 28, 1981, by letter, the Union demanded that Respondent recognize and negotiate with it as the exclusive representative of the warehousemen and finishers working at the former Name Brand locations. On May 11, 1981, Respondent sent a letter to the Union refusing to grant recognition because "it is Alpert's position that your Union does not validly represent a majority of the warehouse and furniture finishing employees within an appropriate unit of the Company."

In the instant case, the General Counsel contends that Respondent is the successor to Name Brand, Inc., obligated to recognize and bargain with the Union as the collective-bargaining representative of the warehousemen and finishers working at the former Name Brand locations. Respondent's refusal to do so, the General Counsel urges, is in violation of Section 8(a)(5) of the Act. Respondent asserts that it is not legally required to recognize the Union since, in Respondent's view, the initial recognition of the Union, by Name Brand, was invalid;[1] in the May to September 1981 period, Respondent hired certain additional employees, properly part of the unit, which created an objective basis for a reasonably based doubt of the Union's majority status; Respondent changed the warehousing system previously utilized by Name Brand and this change had so great an impact on the jobs of the unit employees "that they were no longer in the same employing industry."

B. *Facts*[2]

As indicated, Respondent, on April 1, 1981, began operation of a retail home furniture business at the former Name Brand locations, without hiatus, utilizing the identical warehousemen and finishers employee complement previously employed by Name Brand. It adhered to the wage scales and benefit programs set forth in the Union's contract with Name Brand. Also, at various times between May 7 and September 22, 1981, it hired some 10 part-time warehousemen, generally for periods of relatively short duration. Thus, by January 4, 1982, only three of those part-time workers were still employed by Respondent.[3]

Respondent continued the retail home furniture business formerly run by Name Brand, featuring the same type products for sale to the general public. The warehousemen and finishers retained their classifications and performed their jobs utilizing, essentially, the same tools. There were, however, certain changes made in the warehousing and distribution system. Under Name Brand, each store was set up as a warehouse-showroom, that is, it stocked merchandise in a warehouse portion of the store and sold it from the showroom portion. Each store also operated a home delivery service. In addition, the Granger Road store, in Independence, Ohio, functioned as a main warehouse. The warehousemen at each of the stores unloaded trucks delivering merchandise, stocked or stored the furniture in the warehouse, unloaded and reloaded shuttle (store to store) trucks and customer delivery trucks, and pulled merchandise from stock for pickup by customers. These tasks involved certain paperwork such as checking merchandise against freight bills, tagging furniture, and taking merchandise from stock in accordance with transfer slips and customer bills of sale. The warehousemen also assembled furniture for display and moved it from place to place in the store.

Respondent, as noted, made certain changes affecting the work of the warehousemen. Under Alpert's system, the Granger Road store functions as the warehouse for the other stores. Thus, all home delivery is performed from the Granger store and, consequently, only the warehousemen working at that store engage in pulling stock merchandise for loading onto the customer delivery trucks. The other stores are, basically, set up as showrooms, although each store keeps a certain amount of additional merchandise in stock. Nonetheless, the record evidence reflects that the warehousemen at all former Name Brand locations continue to load and unload various furniture trucks (but not delivery trucks) and to perform the other tasks formerly performed under Name Brand, as described above.

Alpert's also introduced a new, more sophisticated, inventory system requiring warehousemen to engage in additional paperwork, check merchandise more carefully against documents, record the exact location in the warehouse of each piece of merchandise, pull orders by piece rather than type of merchandise, and amend store records when changing the location of merchandise. Whereas, under Name Brand, merchandise was stored by manufacturer and type of goods and pulled according to type rather than particular piece, Alpert's instituted a random warehousing system under which merchandise is stored wherever the warehousemen decide to put it and, then, the exact location of each piece is recorded. There-

[1] At the hearing, I refused to allow Respondent to adduce evidence designed to attack the validity of the initial recognition as that event occurred outside the 10(b) limitations period. In agreement with the General Counsel, I ruled that the contract between Name Brand and the Union, lawful on its face, establishes the Union's presumptive majority status. Cf. *Pick-Mt. Laurel Corp. v. NLRB*, 625 F.2d 476 (3d Cir. 1980), reversing and remanding 239 NLRB 1257 (1979), on remand 259 NLRB 302 (1981).

[2] The factfindings contained herein are based on a composite of documentary and testimonial evidence introduced at the hearing. The record is substantially free of significant evidentiary conflict.

[3] Respondent contends that the unit was augmented by the transfer, from other Alpert stores, of five individuals, Gregus, Scheffler, Eichenberger, Lucky, and Duzinski, to the former Name Brand locations. However, the record evidence reveals that Gregus spends the majority of his time doing nonunit work, at a substantially lower rate of pay than that received by the unit employees, and that Scheffler and Eichenberger function as supervisors. There is no evidence concerning the dates of transfer of Lucky and Duzinski.

after merchandise is pulled, by particular piece, from its recorded location.

The functions of the furniture refinishers have not been changed. They, as under Name Brand, inspect and repair furniture, working in enclosed shop areas of the warehouses. As before, they are assigned to particular stores and rotate to those stores too small to keep a full-time finisher. They continue to supply their own tools, the same tools used before the sale. They continue to work under the warehouse manager. Indeed, the only change in job duties, after the sale, revealed by the record evidence, is that one finisher, Reinhart, performs some furniture repair work at customer homes.

C. *Conclusions*

On April 1, 1981, Respondent purchased the assets of Name Brand, at its eight retail home furniture stores in the northeast Ohio area and, without hiatus, continued the same business operations at the same locations. It sold the same type furniture to the general public in that geographical locale. From the outset, Respondent utilized the identical complement of warehousemen and finishers previously employed by Name Brand, in the same classifications and at the same locations. The wages, benefits, and working conditions of the unit employees remained the same. The new warehousing and distribution systems instituted by Respondent did not cause a change in the basic character of the work performed by the unit employees. Rather, their jobs remained the same, even if certain details were new. In these circumstances, I conclude that Respondent was and is the successor employer to Name Brand, Inc.

At the time of the takeover, the Union was the recognized collective-bargaining representative of the warehousemen and finishers working at the eight stores involved herein. By virtue of its contract with Name Brand, lawful on its face, it was entitled to a presumption of majority status. Respondent has not shown that the Union did not, in fact, represent a majority of the unit employees when, on April 10, it demanded recognition, or that there was objective basis for a reasonably based doubt of the Union's majority status. I, therefore, find and conclude that, in refusing to recognize and bargain with the Union as the exclusive representative of its warehousemen and finisher employees, Respondent, as successor employer, violated Section 8(a)(5) of the Act.

IV. THE EFFECTS 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 relation 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 certain unfair labor practice conduct in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Respondent, Alpert's Inc., is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 392, is a labor organization within the meaning of Section 2(5) of the Act.

3. All regular, full-time warehousemen and finishers employed at Alpert's stores, at the locations listed below, but excluding all office clerical employees, students, professionals, 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:

3166 West 106 Street, Cleveland, Ohio 44102
33205 Curtis Blvd., Eastlake, Ohio 44094
1690 Sprague Road, Cleveland, Ohio 44108
1320 Starlight Drive, Akron, Ohio 44306
6474 Lorain Blvd., Elyria, Ohio 44035
4435 Lincoln Way, Massillon, Ohio 44646
6303 Granger Road, Independence, Ohio 44131
4335 Northfield Road, Warrensville Hts., Ohio 44128

4. At all times material herein the Union has been, and is now, the exclusive representative of all employees in the aforesaid bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to recognize and bargain with the Union, as exclusive representative of the bargaining unit employees, concerning rates of pay, wages, hours, and other terms and conditions of employment, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[4]

The Respondent, Alpert's Inc., Cleveland, 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 International Brotherhood of Teamsters,

[4] 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.

Chauffeurs, Warehousemen and Helpers of America, Local Union No. 392, as the exclusive bargaining representative of its employees in the appropriate unit as described above.

(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 necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the Union 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 Cleveland, Ohio, area stores, formerly operated by Name Brand, Inc., copies of the attached notice marked "Appendix."[5] 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 it 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 ensure 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 Respondent has taken to comply herewith.

[5] 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 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 392, as the exclusive bargaining representative of our employees, in the appropriate bargaining unit. The unit includes all regular, full-time warehousemen and finishers employed at Alpert's stores, at the locations named below, but excluding all office clerical employees, students, professionals, guards and supervisors as defined in the Act:

3166 West 106 Street, Cleveland, Ohio 44102
33205 Curtis Blvd., Eastlake, Ohio 44094
1690 Sprague Road, Cleveland, Ohio 44108
1320 Starlight Drive, Akron, Ohio 44306
6474 Lorain Blvd., Elyria, Ohio 44035
4435 Lincoln Way, Massillon, Ohio 44646
6303 Granger Road, Independence, Ohio 44131
4335 Northfield Road, Warrensville Hts., Ohio 44128

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

WE WILL, upon request, bargain with the Union as the exclusive representative of all employees in the appropriate unit, described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an agreement is reached, WE WILL embody such agreement in a signed contract.

ALPERT'S, INC.