Sav-on Drugs, Inc. ***and*** **Guild for Professional Pharmacists.** Case 31-CA-11356

May 28, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on July 21, 1981, and an amended charge filed on August 28, 1981, by Guild for Professional Pharmacists, herein called the Union, and duly served on Sav-On Drugs, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on September 10, 1981, 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 and 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 February 11, 1981, following a Board election in Cases 31-RC-4134, 31-RC-4135, 31-RC-4136, 31-RC-4137, 31-RC-4138, 31-RC-4139, 31-RC-4140, 31-RC-4141, 31-RC-4196,[1] 31-RC-4187, and 31-RC-4219, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[2] and that, commencing on or about April 9, 1981, 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, in that on or about May 4, 1981, Respondent unilaterally and without prior consultation with the Union granted a wage increase of $1 an hour to employees in the bargaining unit. On September 25, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On January 4, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 15, 1982, 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 on January 28, 1982, filed a response to the 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 Motion for Summary Judgment

Counsel for the General Counsel in his Motion for Summary Judgment herein avers that the instant case is directly related to Case 31-CA-11070, involving the same parties and otherwise identically captioned, pending before the Board on a motion similar to that herein at the time the instant motion was filed. That case, involving Respondent's general refusal to recognize and bargain with the Union following the Board's certification in the underlying representation proceeding, differs substantively from the instant case only in that the complaint in that case alleged a general refusal to recognize and bargain in its paragraph (9), whereas the instant complaint alleges that Respondent, subsequent to its general refusal to bargain, unilaterally granted a wage increase of $1 an hour to employees in the certified bargaining unit without prior consultation or bargaining with the Union. Counsel for the General Counsel further notes that since most of the procedural underpinnings and arguments for the motion in the instant case have already been set forth in the General Counsel's motion in Case 31-CA-11070, except for copies of the charge and amended charge, complaint and answer, and certificates of service thereof in the instant case, they were not reiterated here; that Respondent in its answer admits the Union's labor organization status; and that Respondent's answer is otherwise substantively the same as its answer in Case 31-CA-11070. Counsel for the General Counsel therefore requests that the Board "administratively notice the Motion To Transfer Case To and Continue Proceedings Before the Board and For Summary Judgment in Case 31-CA-11070, together with supporting arguments and documents, and grant the similar Motion in the instant case, for the same reasons asserted in the prior Motion."

Respondent, in its response to the Notice To Show Cause, initially notes that "the ultimate issue in the instant case, i.e., the obligation of the Respondent to bargain with the Guild for Professional

[1] The Board's Decision on Review and Direction of Election in the underlying representation proceeding is reported at 243 NLRB 859 (1979).

[2] Official notice is taken of the record in the representation proceeding, Case 31-RC-4134, *et al.*, 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 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Pharmacists, is the same issue underlying the General Counsel's Motion for Summary Judgment now pending before the Board in Case No. 31-CA-11070." Thus, while Respondent admits the operative factual allegation of the complaint, including the Union's labor organization status, the certification, and the request and Respondent's refusal to bargain, it reiterates here its contentions that the Board acted improperly in granting the request for review in the underlying representation case, Case 31-RC-4134, *et al.*,[3] and that the certification of the Union was improper.

The Board, in agreement with the parties, concludes that the instant case is directly related to Case 31-CA-11070, and that the ultimate issue herein is the same. The Board has taken notice of the motion and the record and underlying documents and arguments in Case 31-CA-11070. On review of the entire record herein, inlcuding that in Case 31-CA-11070, noted above, as well as the record in the underlying representation proceeding, we find Respondent's asserted defenses herein to be without merit for the reasons more fully discussed in our recent decision in Case 31-CA-11070. 261 NLRB 1452[4] issued this date.

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.[5]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and in Case 31-CA-11070, as noted above, and 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 Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the 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 is a California corporation engaged in the retail sale of general merchandise and prescription drugs at numerous locations throughout the State of California with its principle office and place of business in Anaheim, California. Respondent in the course and conduct of its business operations annually derives gross revenues in excess of $500,000 and annually purchases and receives goods and services valued in excess of $50,000 directly from suppliers located outside the State of California.

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

Guild for Professional Pharmacists 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 registered pharmacists employed by Respondent at its facilities located within the State of California, excluding all other employees, guards, and supervisors as defined in the Act.

2. The certification

On November 28, 1979, 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 31, designated the Union as their representative for the purpose of collective bargaining with Respondent.

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[3] 243 NLRB 859.

[4] With respect to Respondent's assertion that the Board acted improperly in granting the request for review in the underlying representation proceeding, and reversing the Regional Director, we note, *inter alia*, that the Regional Director's basis for dismissing the petition, i.e., that the Union was not a labor organization, was incorrect as a matter of law. Respondent now admits the Union's status as a labor organization. Further, the conclusion of the Board that the head pharmacists or pharmacy managers were not supervisors as a class—a finding based on a complete record and premised in part on factors not alluded to in the Regional Director's decision (see 243 NLRB at 861, fn. 8)—cannot be deemed to have denied Respondent due process of law. Indeed, Respondent has been afforded ample due process, and has availed itself of full opportunity, as indicated by the extensive record in these related proceedings, to raise and fully litigate the issues which it now asserts preclude summary judgment. See 261 NLRB 1452.

Member Jenkins dissented in the underlying representation case, but recognizes the controlling character of that decision and thus joins in finding the violations here.

[5] 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).

The Union was certified as the collective-bargaining representative of the employees in said unit on February 11, 1981, 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 February 19, 1981, and at all times thereafter, the Union has requested 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 April 9, 1981, 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, and on or about May 4, 1981, Respondent unilaterally and without prior consultation with the Union granted a wage increase to employees in the unit.

Accordingly, we find that Respondent has, since April 9, 1981, 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,[6] 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 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

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

CONCLUSIONS OF LAW

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

2. Guild for Professional Pharmacists is a labor organization within the meaning of Section 2(5) of the Act.

3. All registered pharmacists employed by Respondent at its facilities located within the State of California, excluding all other 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 February 11, 1981, 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 April 9, 1981, 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, and by unilaterally granting a wage increase to unit employees on May 4, 1981, without prior consultation with the Union, 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 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.

[6] Nothing in our Order, however, shall require Respondent to rescind or withdraw any wages or benefits that employees now enjoy. See *Keystone Steel & Wire, Division of Keystone Consolidated Industries, Inc.*, 248 NLRB 283 (1980).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Sav-On Drugs, Inc., Anaheim, California, 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, and unilaterally granting wage increases without prior consultation with Guild for Professional Pharmacists as the exclusive bargaining representative of its employees in the following appropriate unit:

> All registered pharmacists employed by Respondent at its facilities located within the State of California, excluding all other 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 each of its California facilities where pharmacists are employed copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 31, 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 ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT unilaterally grant wage increases without prior consultation or otherwise refuse to bargain collectively concerning rates of pay, wages, hours, and other term and conditions of employment with Guild for Professional Pharmacists 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 registered pharmacists employed by us at our facilities located within the State of California, excluding all other employees, guards, and supervisors as defined in the Act.

SAV-ON DRUGS, INC.

[7] 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."