

**Vore Cinema Corp. and Local No. 292, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO.** Cases 25-CA-10373 and 25-CA-11327

March 10, 1981

DECISION AND ORDER

On October 21, 1980, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting argument.

The Board has considered the record and the attached Decision in light of the exceptions and argument and has decided to **affirm** the rulings, findings,<sup>1</sup> 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, Vore Cinema Corp., Muncie, Indiana, its **officers**, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: This case was heard in Muncie, Indiana, on April 2 and 3, 1980, based on unfair labor practice charges filed by Local No. 292, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, herein called the Union, on November 20, 1978, and September 9, 1979, and complaints issued on behalf of the National Labor Relations Board, herein called the Board, by the Regional Director for Region 25 of the Board, on December 29, 1978, as amended on May 17, 1979, and on October 19, 1979, as amended on March 21, 1980. The consolidated complaints allege that Vore Cinema Corp., herein called Respondent, violated Section 8(a)(1) and (5) of the Act by threats to replace employees because of their support for the Union, by failing and refusing to bargain in good faith with the Union, and by locking out its employees.

All parties were given a full opportunity to participate, to introduce relevant evidence, to examine and to cross-

examine witnesses, to argue orally, and to file briefs. Briefs were filed by General Counsel and Respondent and have been carefully considered.

Based on the entire record herein, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. **RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS, PRELIMINARY CONCLUSIONS OF LAW**

Respondent is an Indiana corporation engaged in the operation of a motion picture theater in Muncie, Indiana. **Jurisdiction** is not in dispute. The complaint **alleges**, Respondent admits, and I find and conclude that, at all times material herein, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent acquired the Rivoli Theater in Muncie, Indiana, in February 1978, as a successor to Metro Amusements, Inc. Metro Amusements had a collective-bargaining agreement with the Union covering its stagehands and motion picture machine operators (projectionists), effective from May 1, 1976, until April 30, 1979. With certain exceptions, to be discussed *infra*, Respondent continued to operate the Rivoli Theater under the terms of that contract.

B. *Meetings and Events During 1978*

About January 25, 1978, prior to his acquisition of the Rivoli Theater, Roger Vore, Respondent's president, spoke with Jerry Pruden who was, at that time, the Union's business agent. They met on February 4, 1978, to discuss Vore's acceptance of the existing contract and/or to negotiate a new agreement. According to Vore, whose recollection of the events did not differ significantly from Pruden's, the Union proffered for Vore's signature an addendum to the existing contract and the National Pension Fund Agreement. These agreements would have increased wages. Vore did not sign them but did agree to abide by the terms of the existing contract.

In the course of this initial meeting, Vore expressed concern over the competence of the theater's projectionists, basing his concern, at least in part, upon a complaint from a patron of the theater. His concern arose from a limitation, perceived by Vore, on his right to discharge employees. Pruden assured Vore that he had the right to discharge employees for good cause, subject to informing the Union of those reasons, in writing. Pruden asked also that the Union be given the opportunity to replace any discharged employees with union projectionists and agreed to provide competent projectionists to **Respond-**

ent, upon request.' Vore, in the course of this meeting, may have also expressed some concerns about the contractual guarantees of 5-hour shifts and of the number of shifts to be worked each week.

Pruden and Vore met again on March 17, and about March 26, 1978. In the course of these meetings Vore proposed the elimination of the guaranteed shifts and the inclusion of the union employees under Respondent's pension plan. Pruden rejected his proposals and Vore continued to refuse to sign the Union's proposed addendum and National Pension Fund Agreement. He continued to pay his employees, however, pursuant to the contractually established wage rates.

After March 25, 1978, Pruden tried, without success, to arrange another meeting with Vore. He called Vore's office repeatedly, leaving messages requesting a return call. Vore never called back. Written requests for meetings for contract negotiations were sent by Pruden and by an attorney representing the Union on May 25 and August 14, 1978. Vore responded to neither of them. Pruden made no further efforts to contact Vore after the August 14, 1978, letter.

Vore testified that he ceased to negotiate with the Union because "of the incompetency of the people they were furnishing me and the fact that under this existing contract [I] was unable to discharge them—according to my advisors."<sup>2</sup> In June or July 1978, Vore ceased to make Respondent's contributions to the Union's pension plan. He contended that he did so because he had no forms and because the union projectionists had, in the past, supplied the forms.

On December 23, 1978, employee Perry Niles had a conversation with Roger Vore and Theater Manager Bonita Shores stemming from an earlier *mixup* concerning the payroll sheet and the paychecks. In this conversation Vore told Niles "that he did not want me to go to the Local when I had a problem, that it was to go directly to Mrs. Shores, so they could get it ironed out, without bringing the Union into it." On the following day, there was a problem in the scheduling; Niles had not been notified of a change. Vore and Shores came into the projection booth where Niles was working and Vore told Niles, "you were running late today . . . We could go right to the Union for this, but we are not, because we want you to come, with all your problems . . . to Mrs. Shores, so that we can get it ironed out here." In the course of a further discussion over Respondent's obligation to pay for the performance of certain routine chores, Vore complained that he had lost money in that theater "and did not want to do this next year." Niles' testimony is uncontradicted.

The foregoing conduct was the subject of a charge, complaint, and amendment to complaint in Case 25-CA-10373, alleging violations of Section 8(a)(1) and (5) of the Act. Those allegations were then the subject of an *infor-*

*mal* settlement agreement entered into and approved on May 21, 1979, which provided, *inter alia*: That Respondent would bargain with the Union in the appropriate bargaining unit; that Respondent would not fail and refuse to make appropriate pension fund contributions and would make the contributions then due and owing; and that Respondent would refrain from otherwise interfering with, restraining, or coercing its employees in the exercise of their statutory rights. Simultaneously with the issuance of the consolidated complaint in Cases 25-CA-10373 and 25-CA-11327, the Regional Director withdrew his approval of that settlement agreement. The consolidated complaint alleges anew Respondent's refusals to bargain during 1978.

### C. The 1979 *Negotiations and Lockout*

The parties did not meet again until June 19, 1979,<sup>3</sup> after the expiration of the earlier agreement. At the June 19 meeting and all subsequent ones, Vore was represented by Rayford Blankenship, a labor relations consultant.

The meeting of June 19 was attended by Seth Pruden, the Union's new business agent, and William Groth, its attorney, Vore, Shores, and Blankenship. The Union presented its contract proposals which called for, among other things, a minimum guaranteed workweek of 46 hours, minimum shifts of 5 hours, 15 minutes preparation time, overtime at double time, an increase in the pension fund contribution to \$1.35 per man per day, a grievance and arbitration clause, a requirement that stage work be staffed by two employees with a minimum of 2 hours' work each, and a wage rate of \$7.08 for the first year, increasing by approximately 50 cents per hour in each of the second and third years. The existing wage rate at that time was approximately \$6.05 per hour. The parties went through the Union's proposal in a meeting lasting 1 to 2 hours and some agreements were reached. Respondent voiced objections to the wage rates and particularly to the guaranteed minimum number of hours per shift. Respondent repeatedly sought to eliminate this guarantee because of changes in the industry and factors causing cancellations of showings.<sup>4</sup> Respondent also objected to the absence of a management-rights clause in the Union's proposal, reiterating Vore's belief that Respondent needed such a clause to permit it to discharge employees for cause. The foregoing description is taken essentially from the versions as testified to by Vore, Shores, and Pruden which are not, in any substantial way, in conflict. According to Blankenship's notes of this meeting, the Union was additionally told that Respondent would be proposing a management rights clause, disciplinary policies, requirement that employees pay for damages to equipment, an elimination of the minimum shift requirement, \$6.05 per hour and time and a half for overtime over 40 hours per week, Respondent's pension plan, and

<sup>3</sup> All dates hereinafter are 1979 unless otherwise specified.

Up to that time and until negotiations ultimately ceased, Respondent ran two showings of each film each weekday night. With intermissions, this meant that the projection booth in each theater within the Rivoli operated around 4 to 5 hours per night, the length of movies being from 90 to 120 minutes. Vore's intention, carried out after September, was to eliminate the second showing of each film in each theater, thus having only one performance per night.

<sup>1</sup> Theater Manager Shores testified that most of the problems came from a projectionist who left Respondent's employ in early 1978 and was replaced. The remaining projectionists were responsible for some minor errors but no major problems.

<sup>2</sup> Under the existing collective-bargaining agreement, the Union was not the exclusive source of employees for Respondent's theater. Neither did that contract preclude the discharge of incompetent employees.

a no-strike and no-lockout clause if we recognize [the] Union as exclusive agent." Blankenship also testified, without contradiction, that he told the Union at this meeting that he was Respondent's chief negotiator and all proposals and communications were to be made to him.

Three meetings were scheduled after June 19: The first was canceled because of Blankenship's unavailability; Respondent failed to show up for the second meeting; and Respondent canceled the third. They finally met again on July 24.

At the July 24 meeting, Respondent gave the Union its counterproposal. Contained within this proposal were the following provisions:

## 2. Management Rights

The management of the company, the direction and control of the work force in the operation of the company, including the selection, hiring, promotion, and transferring of employees, the suspending, discharging, or otherwise disciplining of employees for cause, the laying off or calling back to work of employees in connection with any reduction or increase of the working force, the determination of employee qualifications, establishment of work schedules and standards of work including job content, the establishment of quality standards, the establishment of methods of work and equipment used and the regulation of such use of equipment and other Company property and its security, the right to introduce and **change** new and different **machinery**, equipment, or facilities, the establishment of job classifications, and the number of employees assigned, improve or substitute methods or equipment, subcontract work, form rules and regulations covering all bargaining unit employees, and all other management functions not specifically contracted away under the terms of this Agreement, are the exclusive rights and functions of the Company and its management.

## DISCHARGE AND SUSPENSION

The Company retains the right to discharge or suspend any employee for cause, **i.e.**, performing their jobs in any manner or conducting themselves in any manner which results in harm to the Company's good name and reputation or results in financial loss to the Company. Further, the Company retains the right to take any disciplinary action, which is just and proper, for violation of Company work rules and regulations.

## DESTRUCTION OF COMPANY EQUIPMENT OR **FILM**

Bargaining unit personnel shall reimburse the Company for all damage to film or equipment, which result from negligence by said personnel.

Respondent's proposal also provided for the elimination of all minimum shift and workweek guarantees, for the inclusion of all bargaining unit personnel under Respondent's pension plan, and a wage rate of 56.05 per hour.

The parties discussed the differences in their proposals. Vore improved his offer to \$7 per hour with a 3-hour-shift guarantee and accepted most of the prior agreement. Left unresolved at the conclusion of this meeting were management rights, wages and the related issue of guaranteed shift **hours**,<sup>5</sup> and the pension plan. As to the latter issue, the Union had tentatively agreed to the inclusion of eligible unit personnel in Respondent's pension plan subject to its examination of a copy of that plan, with pension contributions being made to the Union's fund for those employees not eligible to participate in Respondent's.

In the course of this meeting, according to Shore's credible **recollection**, there was a fairly extensive discussion of management's right to hire or fire projectionists. Seth Pruden assured Respondent that management had the right to discharge for just cause; the Union wanted only to be notified as to what Respondent considered cause. A discussion of what constituted cause followed.

Following this session, by agreement of the parties, the Union wrote out the areas of agreement between the parties. It sent that draft to Vore together with a request that it be furnished the following:

- (1) A copy of the current Vore **Cinema Corporation** pension plan for its employees, and
- (2) A copy of Vore Cinema Corporation's financial report for last fiscal year.

The next meeting was held on September 6. It opened with Blankenship denying that the Union had a right to Respondent's financial report; he contended that Respondent was not pleading poverty and pointed out that Respondent had offered increases in the hourly wage rate, vacations, and pension plan. The Union contended that, by eliminating the guaranteed number of hours per shift, Respondent was effectively reducing the weekly earnings of the employees and this, it contended, was the equivalent of a plea of an inability to pay. In the course of this meeting Respondent did not say that it was unable to pay greater wages but did state that its offer was the best Vore felt it could make.

The Union asked for a copy of Respondent's pension plan. Blankenship acknowledged that the Union was entitled to see it. However, Respondent did not have a copy in its possession at that time; none was furnished to the Union then or ever.

Respondent remained firm on its management-rights proposal and its offer of \$7 per hour with a 3-hour-shift guarantee. It rejected the Union's counterproposal of a nominal (6-cent-per-hour) wage increase coupled with retention of the 5-hour-shift guarantee. At the conclusion of this meeting, the parties were essentially in the same position that they were after the July 24 meeting; **man-**

<sup>5</sup> Seth Pruden recalled, in regard to Respondent's position on the shift guarantee issue, that both Blankenship and Vore contended that the Company "could not afford to pay the guaranteed hours." Respondent denied that it ever contended that it was unable to pay for such a benefit. Pruden's testimony was not corroborated by that of John Culp, Local Union president, who was present at that meeting and testified herein. In the absence of corroboration, I cannot credit Seth Pruden on this crucial point.

agement rights, wages and guaranteed minimum hours, and the pension plan, only to the extent that the Union would not agree until it saw a copy of Respondent's plan, were the only issues in dispute. Respondent asked the Union to take its proposal back to the membership for a vote. The Union agreed to do so, stating, however, that it would recommend rejection. Blankenship told the Union that this was Respondent's final offer and Pruden asked what would happen if the membership did not accept it. According to Shores' recollection, Blankenship stated that they were at impasse and that if the contract were not accepted the Union could strike or management could replace the employees. Culp recalled **Blankenship** saying that the Union could strike or they could return to the bargaining table. Vore recalled Blankenship suggesting that the Union consult with its lawyers and telling them that if there were anything further to be accomplished that they could return to the bargaining table. Pruden's recollection essentially corroborates that of Vore and Shores.

The Union took Respondent's final offer to its members on September 10. Vore called Culp that evening to find out what had been decided. Culp told him that they voted not to act until their attorney had the opportunity to examine it. Vore told Culp, "It appears that we have reached an impasse, and I would exercise my legal option in replacing [the employees] until such time that we can work out our differences." When asked why the men would have to be locked out, Vore replied that it was his counsel's advice to do so. Shortly thereafter, Seth Pruden called Vore and reiterated that the employees had not rejected the offer but had voted not to vote at that time. He suggested that the parties continue on the same basis on which they had been working but Vore refused, repeating his statement on impasse and lockout.

Following his conversations with Culp and Seth Pruden, Vore instructed Shores to the effect that the projectionists were "replaced" and not to be employed until the parties' differences were worked out.

In the early evening of September 11, Culp and projectionist Perry Niles went to the theater. As Niles went to punch in, Shores stopped him and told him that he could not work. He asked if he were discharged. As Niles recalled her answer, Shores told him that he was not discharged but that he had been replaced and, as far as she was concerned, the replacement was **permanent**.<sup>6</sup> She also told them, in response to a question, that the relief projectionist, Brad Renbarger, had also been "replaced."

Respondent's projectionists have not worked for Respondent since September 10; Shores and other employees, such as the doorman, have assumed the duties previously performed by the projectionists. Shores' duties have been expanded to accommodate the additional re-

sponsibilities although the amount of time she works increased only 1 or 2 hours per week. The films arrive in 2,000-foot reels; they must be assembled into 6,000-foot reels for use in the automated projectors. Shores puts the films together, splices in coming attractions, and separates them. She starts the projectors, makes the film changeovers, oils the mechanisms, starts the music, cleans the lenses and glass, and generally handles the running of the film. This, essentially, was the work which the projectionist had previously done. To an extent not fully defined in this record, Respondent also automated some of its projection equipment, simplifying the projectionist's duties.

On November 23, Culp wrote Vore requesting a meeting to continue negotiations. He stated:

Roger, I would like to get this matter settled. My feelings toward you [sic] type of operation is not the same as the past business representatives'. I see no reason for all of these hard feelings and I see no reason why we can not reach an agreement that would be equitable to both of us. Based upon the type of operation you desire to run.

I will be free to meet with you at your convenience and at any time and place you suggest. I will also have the power to sign an agreement at that time.

Sometime subsequent thereto, Vore replied and a meeting was set for January 22, 1980.

When Culp and Vore met on January 22, 1980, Culp gave Vore a new proposal. By that proposal the Union agreed to both a management-rights clause substantially identical to that contained in Respondent's proposal and Vore's proposed \$7-per-hour wage rate with a 3-hour-minimum shift guarantee. The Union further agreed to Respondent's pension plan, as previously discussed. Vore indicated a reluctance to negotiate without counsel and Culp gave him the proposal to read and discuss with Blankenship.

According to Vore's recollection, he told Culp, at this meeting, that he had changed his operation, had automated the projection booth, and that there were no longer any projectionists' positions. He did agree to read the proposal and to go over it with counsel. He acknowledged that the Union had acceded to his proposal for a 3-hour-minimum shift guarantee and to Respondent's management-rights clause proposal.

#### **D. Analysis and Conclusions**

The appropriate point to begin consideration of Respondent's conduct herein is the conduct occurring on and after June 19, 1979. The settlement agreement, approved by the Regional Director on May 21, 1979, purporting to remedy the earlier alleged violations, may not properly be set aside unless subsequent violations, establishing a failure to comply with the terms of settlement, are proven. See *Jackson Manufacturing Company*, 129 NLRB 460 (1960). That presettlement conduct, however, may be considered in assessing Respondent's motive or object in its postsettlement activities. *Northern California*

<sup>6</sup> Culp's recollection is similar: he further recalled Shores stating that she believed that the Union had been replaced. Shores testified that she told them that the projectionists were replaced because of the impasse in negotiations, "until Mr. Vore told [her] otherwise, or something was settled . . . ." In her pre-trial affidavit, she had related, however, that the replacement "was permanent until I was told otherwise." Noting that both Culp's and Shores' affidavit tend to corroborate Niles. I credit his version of the incident.

*District Council of Hodcarriers and Common Laborers of America, AFL-CIO (Joseph Mohamed, Sr., an Individual, d/b/a Joseph's Landscaping Service)*, 154 NLRB 1384 (1965).

Counsel for the General Counsel contends that Respondent, by failing or refusing to furnish a copy of its pension plan and its financial reports, by refusing to meet after September 11, 1979, and by locking its employees out in support of its bargaining positions refused to bargain with the Union in good faith, in violation of Section 8(a)(5) and (1) of the Act.<sup>7</sup> Respondent admits that the Union was entitled to a copy of the pension plan and further admits that it did not furnish it. However, it contends that it attempted, unsuccessfully, to secure a copy for the Union and further that that necessity for furnishing a copy was obviated by the Union's acceptance of the Employer's pension plan for all eligible employees. Respondent also contends that, never having argued that it was unable to meet the Union's monetary demands, it was not obligated to furnish financial data. Finally, in this regard, Respondent argues that its lockout followed a good-faith impasse in bargaining and was a lawful exercise of its economic power.

The record, I believe, is clear that, while the Union had voiced essential agreement to inclusion of eligible employees under Respondent's pension plan (with Respondent making appropriate contributions to the Union's plan for any employees who were not eligible), it had never waived its request and its acknowledged right to see a copy of that plan. Its request for a copy of the plan was made, orally and in writing, after its tentative acceptance of Respondent's plan; obviously, it was not prepared or required to buy a "pig in a poke." The record is also clear that Respondent never furnished a copy of the plan; indeed, its efforts to secure a copy from the insurer appear, at best, to have been **perfunctory**.<sup>8</sup>

Accordingly, I find that, by its refusal and/or failure to supply the Union with a copy of its pension plan, Respondent failed to bargain in good faith with the Union, in violation of Section 8(a)(5) and (1) of the Act. *Mississippi Steel Corporation*, 169 NLRB 647 (1968).<sup>9</sup>

The General Counsel does not appear to contend, and the record would not support a contention, that Respondent, *in haec verb*~pleaded an inability to pay in response to the Union's requested wage (and guaranteed shift) proposals. Nonetheless, the General Counsel argues that Respondent's insistence on elimination of the existing 5-hour-shift guarantee, even though coupled with an hourly wage increase, would have resulted in a substantial reduction in the employees' *weekly* earnings, and that

<sup>7</sup> Although the General Counsel alluded to a "surface bargaining" contention during hearing, no such allegation was pleaded or briefed in the government's case.

<sup>8</sup> Additionally, it is hard to believe that Respondent did not have somewhere in its possession, literature describing the pension plan.

<sup>9</sup> *Newhouse Broadcasting Corporation d/b/a WAPI-TV-AM-FM*, 197 NLRB 885 (1972), cited by Respondent, is distinguishable from the facts of this case. In *Newhouse*, the union made only one, oral, request for a copy of the health insurance policies. The employer agreed to furnish them but inadvertently failed to do so, and the union negotiators made no further request for the documents notwithstanding that a number of meetings were held subsequent to its single request.

such a proposed reduction, in the context of Vore having told Niles (in December 1978) that he lost money in 1978 and did not intend to do so in 1979 and Vore's statement during the September 6, 1979, meeting that this was the best offer he felt he could make, was the equivalent of a plea of financial inability to pay such that Respondent would be required, under *N.L.R.B. v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956), to furnish the requested data.

The General Counsel's contention is, I find, without merit. As the Supreme Court stated in *Truitt*, "Each case must turn upon its particular facts." The facts in this case lead me to conclude that Respondent sought to eliminate or reduce the guaranteed hours in order to facilitate elimination of the second showing of each film on week-day evenings. That this may have been economically advantageous to the employer is not the equivalent of saying that it could not afford to pay. Neither do I find that Vore's statement to Niles, long before these negotiations began, concerning his intention to turn a profit in 1979, uttered in a different context, evidence that his position in negotiations was based on a plea of poverty.

The General Counsel cited *Stockton District Kidney Bean Growers, Inc.*, 165 NLRB 223 (1967), and *Stamco Division of the Monarch Machine Tool Company*, 227 NLRB 1265 (1977), in support of its argument that employer expressions of unwillingness to increase wages combined with other conduct during negotiations may be the equivalent of a poverty plea. In both those cases, however, the triers of fact found that the employers had actually predicated their refusals upon claimed inability to pay. Thus, in *Stamco*, the Administrative Law Judge held that "the undisputed evidence clearly reveals that the entire course of Respondent's conduct during the economic phase of the negotiations was designed to convince the Union that Respondent was in no financial position to grant anything approaching the economic improvements which the Union sought." Similarly, in *Stockton District*, the Trial Examiner noted that he was "unable to distinguish the language used by Respondent here [no mood for an increase in operating expenses because of the drop in prices] from a plea of inability to pay." The General Counsel cited no case, and my own research turned up none, which would establish that an employer's offer which might reduce earnings or which might otherwise inure to the employer's benefit brings a case within the ambit of *Truitt*.

Accordingly, to the extent that the complaint alleges that Respondent violated Section 8(a)(5) of the Act by refusing to comply with the Union's request for financial data. I shall recommend that it be dismissed.

**Respondent and the Union did not meet after September 11, 1979, until January 22, 1980. At that time, the Union offered, essentially, to accept Respondent's last offer. Vore admittedly promised to go over the proposal and to discuss it with his counsel. As of nearly 3 weeks later, however, he had not gotten around to doing so. Apparently, he never did because the Union got no further response from any representative of Respondent. This conduct is strongly reminiscent of Vore's course of conduct following the March 25, 1978, negotiations.**

Then, it will be recalled, Vore simply ceased to negotiate further because of his purported and basically unsupported belief that the Union was furnishing him with incompetent projectionists whom he could not discharge. Similarly, in January, according to Vore, he told Culp that he had automated his projection booths and no longer had positions for projectionists. The record does not support Vore's claim. Vore could not, or would not, describe the extent of automation; moreover, there is evidence that the duties of the projectionists are still being performed at the Rivoli by the theater manager and other employees.

Accordingly, I find that by refusing to bargain with the Union on and after January 22, 1980, Respondent has violated Section 8(a)(5) and (1) of the Act.

It is clear from the foregoing that Respondent's lockout was intended to do more than merely support its legitimate bargaining positions. Respondent was engaged in bad-faith bargaining at the point when it initiated the lockout and it maintained that lockout while continuing to refuse to bargain in good faith with the Union. Its bad-faith bargaining removes this case from the ambit of *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 (1965), wherein the Court held that a temporary lockout solely to bring "economic pressure to bear in support of [a] legitimate bargaining position" did not violate Section 8(a)(1) or (3) of the Act. (Emphasis supplied.) See also *American Cyanamid Company*, 235 NLRB 1316 (1978); and *Movers and Warehousemen's Association of Metropolitan Washington, D.C., Inc., etc.*, 224 NLRB 356 (1976), enf. 550 F.2d 962 (4th Cir. 1977).

Moreover, I note that the evidence herein puts into serious question whether Respondent's lockout was in support of its bargaining position at all. Respondent asked the Union to take its last offer back to the membership. It then locked out the employees before they voted on the offer and while they were seeking the advice of counsel. Subsequently, when the Union acceded to Respondent's proposals, Respondent essentially ignored the Union and failed either to reach agreement or to make any counteroffer, notwithstanding that, as I have found, the work of the projectionists still existed. Thus, it appears that Respondent sought not the Union's agreement, but its elimination.

Accordingly, I find that by locking its employees out on September 10, 1979, Respondent violated Section 8(a)(5) and (1) of the Act.

The General Counsel further contends that Bonita Shores' statements to Perry Niles on September 11, informing him that he had been permanently replaced, constituted an unlawful threat because of the employees' support for or assistance to the Union, in violation of Section 8(a)(1). I agree. It seems clear to me that when, in the context of bad-faith bargaining, an employer tells an employee that he is permanently "replaced" because that employee's representative has refused to give in to the employer's bargaining position, the employer has severely impinged upon the employee's right to join or support his union. See *Movers and Warehousemen's Association of Washington, D.C., supra*.

I further find, in agreement with the General Counsel, that Respondent's most recent unfair labor practices war-

rant that the earlier reached settlement in Case 10-CA-10373 be set aside and that Respondent violated Section 8(a)(5) and (1) of the Act by the conduct involved therein. Thus, it is undenied that, at a time when the Union continued to represent a majority of the employees in an appropriate unit, and after only three bargaining sessions, Respondent broke off negotiations and simply ceased to respond to the Union's urgings that negotiations continue. Its reason for doing so, that the Union was furnishing it with incompetent employees whom it could not discharge, was, even assuming Respondent's sincerity, plainly without support. The record reveals some errors by projectionists, but no gross incompetence; it further reveals that the projectionist who Respondent claimed was causing the most problems ceased to work for Respondent early in 1978 and was replaced. There is no evidence that any incompetent projectionists were referred to Respondent by the Union or that the Union, in any way, inhibited Respondent from discharging projectionists for cause. Neither, of course, is there any basis in law for a successor employer to refuse to negotiate with the union representing its employees on the basis that the contract between the predecessor and the union contained allegedly onerous terms. Collective bargaining is the avenue to alleviate such problems, not self-help.

Finally, I must also conclude that Respondent's cessation of pension fund contributions constituted a unilateral modification of the employees' terms and conditions of employment, in violation of Section 8(a)(5) of the Act. The continued payment of these contributions was Respondent's obligation; its explanation that it failed to make them because the projectionists did not supply it with the forms is both insufficient and implausible (particularly when viewed in light of Respondent having broken off collective bargaining and Vore's position regarding inclusion of his employees under Respondent's pension plan).

### III. THE REMEDY

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, it will be recommended that Respondent be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully locked out its bargaining unit employees on and after September 10, 1979, it will be recommended that Respondent be required to offer them immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any losses they may have suffered by reason of such unlawful conduct. To the extent that it has not already done so, Respondent will be required to make all omitted payments to the pension fund. All backpay due under the terms of this Order shall be computed with interest, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289

(1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>10</sup>

### CONCLUSIONS OF LAW

1. By threatening its employees with permanent replacement because of their membership in and support for the Union, Respondent has violated Section 8(a)(1) of the Act.

2. All projectionists and stage employees of Respondent employed at its Rivoli Theater, exclusive of 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.

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

4. By failing and refusing to bargain with the Union concerning wages, hours, and other terms and conditions of employment, by unilaterally changing working conditions of its employees by failing to make pension fund contributions to the Union on behalf of the employees at the Rivoli Theater, by failing and refusing to furnish the Union with information necessary and relevant to collective bargaining, and by locking out its employees on and after September 10, 1979, in support of its bargaining positions and demands taken in bad faith, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. Respondent has not engaged in any other unfair labor practices not specifically found herein.

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

### ORDER<sup>11</sup>

The Respondent, Vore Cinema Corp., Muncie, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with permanent replacement because of their **support** for and membership in the Union.

(b) Failing and refusing to bargain with the Union in good faith regarding wages, hours, and other terms and conditions of employment, by refusing to meet with the Union, by unilaterally changing working conditions, and by locking out its employees while engaged in bad-faith bargaining.

(c) 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.

<sup>10</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)

<sup>11</sup> 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.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer Perry Niles and Brad Renbarger immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the unlawful conduct involved herein, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) To the extent that it has not already done so, make all omitted contributions into the Union's pension fund.

(c) Post at its place of business in Muncie, Indiana, copies of the attached notice marked "**Appendix.**"<sup>12</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.

(d) 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>12</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

After a hearing at which all parties were afforded the opportunity to present evidence, it has been found that we violated the National Labor Relations Act in certain respects and we have been ordered to post this notice and to carry out its terms.

The Act gives you, as employees, certain rights, including the right:

- To engage in self-organization
- To form, join, or help a union
- To bargain collectively through a representative of your own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all of these things.

Accordingly, we give you these assurances:

WE WILL NOT threaten our employees with permanent replacement because of their membership in or support for International Alliance of Theatrical Stage Employees and Moving Picture Machine Op-

erators of the United States and Canada, AFL-CIO, Local No. 292, or any other union.

**WE WILL NOT** fail and refuse to bargain with the Union in good faith concerning wages, hours, and other terms and conditions of employment, nor will we unilaterally change the working conditions of our employees or lock them out in support of our bad-faith bargaining position.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Local No. 292, or any other labor organiza-

tion, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

**WE WILL** offer Perry Niles and Brad Renbarger immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and **WE WILL** make them whole for any loss of pay suffered by reason of our unlawful conduct, with interest.

**VORE CINEMA CORP.**