

ABC Transnational Transport, Inc.; ACME Fast Freight, Inc., Wholly Owned Subsidiaries of ABC Freight Forwarding Corporation and Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Case 29 CA-6536

August 27, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On June 13, 1979, Administrative Law Judge Max Rosenberg issued the attached Decision in this proceeding. Thereafter, Respondent Acme filed exceptions, and the Charging Party 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, findings,¹ and conclusions² 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 complaint be, and it hereby is, dismissed in its entirety.

¹ The Charging Party 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 examined the record carefully and find no basis for reversing his findings.

Contrary to the Administrative Law Judge, we find that, although at one point Union President Thomas Fitzgibbons stated that he was not told on June 6, 1978, that the contract between the Union and Respondent Acme would continue to be honored, Fitzgibbons meant to testify that he was given assurances to this effect, as clarified by his later testimony.

² Contrary to the Administrative Law Judge, we note that Respondent asserted in its brief to the Administrative Law Judge that the closing of seven terminals was a change in the scope of the enterprise. For this reason, Respondent asserted the closing was a matter of managerial discretion within the meaning of Justice Stewart's concurring opinion in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 320 U.S. 203, 233 (1974). In view of our affirmation of the Administrative Law Judge's conclusions with regard to Respondent's notice to and willingness to bargain with the Union prior to the closing of the terminals, it is unnecessary for us to consider whether Respondent lawfully could refused to bargain on this subject had it received a request to do so.

DECISION

STATEMENT OF THE CASE

MAX ROSENBERG, Administrative Law Judge: With all parties represented, this proceeding was heard before me in Brooklyn, New York, on December 21 and 22, 1978, upon a complaint filed by the General Counsel of the National Labor Relations Board and answers submitted thereto by ABC Transnational Transport, Inc., herein called ABC, and Acme Fast Freight, Inc., herein called Acme (wholly-owned subsidiaries of ABC Freight Forwarding Corporation, herein called ABC-FFC).¹ At issue is whether ABC and Acme violated Section 8(a)(5) of the National Labor Relations Act, as amended, by certain conduct to be detailed below. Briefs have been received from the General Counsel, the Charging Party, and Respondents ABC and Acme, which have been duly considered.

Upon the basis of the entire record made in this proceeding, including my observation of the demeanor of each witness who testified, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS

At the times material herein, Acme, a Delaware corporation, has maintained its principal office and place of business in New Hyde Park, New York, and other places of business in the States of Massachusetts, Washington, Oregon, Michigan, Texas, and California, where it engages in the business of providing freight forwarding and related services.

During the material period herein, ABC has maintained its principal office and place of business on Eleventh Avenue, City and State of New York, and various other places of business in the States of Massachusetts, Washington, Oregon, Michigan, Texas, and California, where it engages in providing freight forwarding and related services. During said period, ABC has been a wholly-owned subsidiary of ABC-FFC, a New York corporation with its principal office and place of business at the same address as Respondent ABC.

During the material annual period, ABC and Acme each derived gross revenues in excess of \$50,000, and each performed services valued in excess of \$50,000 which were performed in, and for various enterprises located in, States other than the State wherein it is located. The complaint alleges, the answer admits, and I find that ABC and Acme are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is undisputed and I find that Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

¹ The complaint, which issued on August 31, 1978, is based upon a charge which was filed and served on July 18, 1978.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that Acme and ABC violated Section 8(a)(5) of the Act by closing Acme's freight terminals in New York City, New York; Boston and Holyoke, Massachusetts; Portland, Oregon; Houston and San Antonio, Texas; and Detroit, Michigan, and, also, by transferring the work formerly performed at those terminals to ABC's terminals in the same cities, without notifying the Union of the closures or transfers and without affording it an opportunity to bargain over these matters.² Acme and ABC deny the commission of any labor practices banned by the statute. For the reasons set forth hereinafter, I find these allegations to lack merit and I shall dismiss the complaint in its entirety.

For several decades, Acme has engaged in the business of forwarding freight for various shippers from its terminals located throughout the United States under a nationwide permit obtained from the Interstate Commerce Commission. For some undisclosed period of time, Acme has maintained contractual relations with the Union covering the terms and conditions of Acme's employees at all terminals. The latest compact between the parties was effective from March 1, 1976, to March 1, 1979.

Prior to June 12, 1978,³ Acme operated terminals in approximately 60 locations throughout the country, seven of which were situated in Maspeth, New York; Holyoke and Boston, Massachusetts; Houston and San Antonio, Texas; Portland, Oregon; and, Detroit, Michigan. It is uncontested and I find that, during the annual period immediately preceding June 12, Acme's nationwide system had sustained operational losses totaling \$1 million and that monthly losses were running at the rate of \$500,000. In consequence of these staggering deficits, the management of Acme undertook a survey of its operations in December 1977 with a view toward eliminating the unprofitable terminals in an effort to survive as a corporate entity. As the losses continued into early 1978, Acme's then-president, Peter Thomson, decided to put the enterprise up for sale.

William Kearney, a staff vice president of Acme in charge of such matters as personnel and labor relations, testified that, prior to June 12, President Thomson had engaged in negotiations with several companies for the sale of the business. Because of these endeavors, it was decided to hold in abeyance the closure of certain terminals until such time as a sale had been made. Sometime in May, Kearney received a telephone call from Thomas Fitzgibbons, the Union's president. During their conversation, Fitzgibbons stated that he had heard that Acme had been sold. In this regard, the union president testimonially related that he

had become aware, either from articles in financial journals or rumors, that Acme was seeking a purchaser of its enterprise in late 1977 or early 1978. Kearney assured Fitzgibbons that, although several purchasers had evinced an interest in acquiring Acme, none had yet done so, and he promised to advise the labor leader just as soon as this event occurred.

Believing that a sale was imminent and that ABC-FFC, a holding company which owned ABC, would be the successful bidder, Kearney telephoned Fitzgibbons to report this and to arrange for a meeting which was held on June 6, in the latter's office. Shortly after the session started, Kearney and Fitzgibbons were joined by Marvin Barsky, the vice president of ABC. According to Kearney, Barsky was invited by him to acquaint Fitzgibbons with a representative of the potential purchaser. After the meeting opened, and according to Kearney's testimony, he embarked upon a discussion of Acme's deteriorating financial condition. Kearney disclosed that Acme's monthly losses had persisted at the \$500,000 figure with no improvement in sight, and that steps would immediately have to be taken to stem those losses and place the Company on a more economical footing. At this juncture, Kearney advised Fitzgibbons that Acme had contemplated closing several terminals to reduce costs and specifically mentioned the ones in Maspeth, Holyoke, Boston, Portland, San Antonio, Houston, and Detroit. Fitzgibbons replied that he was aware of Acme's financial plight and could understand the firm's desire to curb the losses by closures, but he expressed his concern about the impact of the closings upon the affected employees. Kearney assured his counterpart that it was Acme's intention to retain as many of them as was economically feasible. Fitzgibbons then remarked to Kearney and Barsky that "I am not going to agree with you that you have got to close this station or that station . . . that's your business. You are running the company. But I want to make sure the employees get a fair shake." Kearney thereupon explained that ABC-FFC was merely purchasing the stock of Acme; Acme would operate independently of ABC; and that the Union contract with Acme would continue to be honored.

It is Kearney's testimony that the conversation on June 6 then turned to the plight of the Maspeth, New York, employees upon the closure of that terminal. In this regard, the record discloses and I find that, in 1971, Acme opened a large freight terminal in North Bergen, New Jersey, and concurrently closed the freight facilities which it had theretofore maintained in Manhattan, New York. With the establishment of the North Bergen facility, the Union and Acme devised a North Bergen seniority list which encompassed all employees in the metropolitan area of New York City. When the employees at the various stations in New York City lost their jobs, they were entitled to and did exercise their contractual bumping privileges and, if they so desired, obtained work at the North Bergen terminal without any change in their employment benefits.

In an experimental move to obtain more freight in New York City in and after 1971, Acme opened a station on Watt Street in Lower Manhattan. To staff this terminal, employees were drawn from the North Bergen seniority list. This venture proved unprofitable and was abandoned, with the result that the employees returned to the North Bergen

² In an apparent attempt to hold ABC jointly responsible for the closures of Acme's terminals and/or for having allegedly participated in the transfer of work from those terminals to ABC's stations, all in violation of Sec. 8(a)(5) of the Act, and to obtain a remedial order against ABC as well as Acme, the General Counsel has sought to portray ABC and Acme as a single employer. In view of the findings hereinafter made and the conclusions drawn therefrom that Acme did not offend the provisions of that Section by the closure of its terminals and did not transfer any work from those terminals to stations maintained by ABC, I deem it unnecessary to pass upon the General Counsel's single-employer contention. In any event, I am hardly persuaded on the record before me that the necessary evidential ingredients to establish the existence of a single integrated enterprise have been proven.

³ Unless otherwise indicated, all dates herein are in 1978.

list. Similar attempts to establish profitable stations proved unsuccessful in Greenpoint, Brooklyn, and Woodside, Queens. Finally, in 1977, Acme opened the terminal in Maspeth. By early 1978, this venture also proved to be unprofitable. During their meeting of June 6, Kearney advised Fitzgibbons that, if Acme did close the Maspeth station, the same contractual procedures used at Watt Street, Greenpoint, and Woodside would be utilized to transfer the Maspeth employees to North Bergen. Turning to the matter of freight deliveries, Kearney stated that the freight which Acme received from the New York Counties of Suffolk, Nassau, and Queens would thereafter be hauled to the North Bergen terminal in accordance with past practice when the other stations had been closed in New York City. Before the meeting ended, Kearney promised to inform Fitzgibbons when the sale of Acme was completed. In his testimony, Kearney emphatically denied that Fitzgibbons had requested that Acme bargain with him over the closure of the mentioned terminals at any time during their June 6 conversation.

When called to the stand, Marvin Barsky, ABC's vice president who attended the June 6 session, corroborated Kearney's testimony in all salient respects. Thus, Barsky confirmed that Kearney had raised the issue of closing the seven terminals after Acme's probable sale to ABC-FFC and had discussed with Fitzgibbons the contractual arrangements which would protect the Maspeth employees when that facility was terminated. Barsky also flatly denied that Fitzgibbons had evinced any desire to be notified of the proposed closings prior to their demise.

I credit the testimony of Kearney and Barsky concerning the events which transpired at the June 6 meeting because I am not convinced that Fitzgibbons had faithfully related the contents of his discussions with these men when he was called as a witness. During his testimony, Fitzgibbons sought to downplay the role which Kearney played in the dialogue, claiming that Acme's vice president, who had been in charge of personnel and labor relations for many years, was little more than an observer. Yet, Fitzgibbons acknowledged that he was made to understand at this meeting that, despite the possible sale to ABC-FFC, Acme would remain an independent entity and would honor its contractual obligation to the Union. Moreover, Fitzgibbons further acknowledged that, on all other occasions both before and after this meeting, he uniformly sought the ear of Kearney, and not Barsky, when he desired information concerning the termination of stations. In his testimony, Fitzgibbons related that Kearney did mention the topic of Acme's huge monthly losses and that Barsky, and possibly Kearney, then stated that Acme would close some stations to absorb the deficits. Initially, Fitzgibbons claimed that Barsky failed to identify any specific terminals which would be shut down inasmuch as ABC-FFC was not yet the owner of Acme. He finally admitted that Barsky did mention by name the stations in Maspeth, Massachusetts, and the West Coast, but claimed that Barsky was unprepared to spell out any details. According to Fitzgibbons, after inquiring into the nature of the sale of Acme, he thereupon launched into a discussion of the status of the collective-bargaining agreement between the Union and Acme. Barsky refused to commit ABC-FFC to the assumption of the

contract, whereupon Fitzgibbons stated that "before they made any changes, that they would sit down with the Union, and inform us of those changes, so we would have the opportunity to discuss them, and have our input, and take whatever position we thought would be appropriate on the changes." However, Fitzgibbons did not deny Kearney's testimony that the subject of the contractual bumping rights of employees at Maspeth was discussed extensively at the meeting.

Events abided until June 11 when Kearney learned from President Peter Thomson that Acme's sale to ABC-FFC would be consummated on June 12. With the purchase, an executive vice president of Acme, Ron Beacham, replaced Thomson as president, and all other officers retained their current positions. Acme's headquarters remained in New Hyde Park, New York, where it maintains its own books and records, and continues to formulate its own labor policies and administer the collective-bargaining agreement with the Union. By letter dated June 14, Beacham informed all of Acme's employees of the sale.

Following the change in ownership, Acme began to execute its plan to close some of its terminals. On June 13, Acme posted a notice on the bulletin board at its Holyoke terminal announcing that all jobs would be abolished on June 16. Concurrent with the posting, copies of the notice were given to the affected employees and the Union's local chairman. Kearney testified without contradiction, and I find that these procedures were dictated by the terms of the labor compact between Acme and the Union, and had uniformly been utilized in the past without objection from that labor organization. Indeed, rule 22(c) of that agreement prescribes that "Employees with fifteen (15) years seniority or more, who are laid off due to abandonment of a station or curtailment of service shall be given at least fifteen (15) working days notice of force reduction or abandonment of position," and rule 21 requires that all employees be given at least a 3-day notice of abolishment of position. Kearney testified that, although decisions to close stations had been made and implemented in the same fashion in the past, no formal notification was ever afforded directly to Fitzgibbons or his associates prior to the closings, and Acme previously had never received any protests from Fitzgibbons about lack of notification or any requests to bargain over the closures. In this regard, Philip Carusi, Acme's vice president who assisted Kearney in matters relating to labor relations, testified without contradiction and I find that, during the 2 years in which he held his present position, the usual procedures which were followed when a decision was made by Acme to eliminate a terminal was to post a bulletin at the station informing the employees of the intended action and to transmit a copy of the bulletin to the local union representative. In many instances, the affected employees would contact Union President Fitzgibbons or his assistant, Vice President Albert Vollero, to inform them of the date of the closures. In other instances, Kearney or Carusi would get in touch with these union officials prior to the closings and apprise them of the decision to phase out the station. According to Carusi, after assuring the union agents that Acme would honor the terms of the existing collective-bargaining contract relating to the abandonment of facilities, neither Fitzgibbons nor Vollero ever objected to this prac-

tice or ever asked to meet with Acme's representatives to bargain over the elimination of a station.

Continuing Kearney's testimonial narrative, he related and I find that, on June 14, he received a call from Lou Maloof, a union official who shared offices with Fitzgibbons at the union headquarters. At the outset of their conversation, Maloof inquired whether Acme had been sold, and Kearney replied in the affirmative. Maloof then inquired into the status of the Holyoke terminal because of the notices which had been distributed to the employees and the local union chairman at that station. Kearney replied that Acme contemplated closing that station on June 16 as the notice indicated, as well as the stations in Maspeth, San Antonio, Houston, Boston, Portland, and Detroit, and Kearney remarked that he had conveyed this to Union President Fitzgibbons at their meeting on June 6. Upon receiving this information, Maloof asked what arrangements had been made for furloughing the Holyoke employees, and Kearney responded that they would be afforded all of the benefits spelled out in the existing collective-bargaining agreement between the parties. It is Kearney's testimony that Maloof was satisfied with Kearney's explanation and did not make any demand for bargaining over these contemplated closures.

Kearney also testified that he next heard from Fitzgibbons on June 21 when the latter telephoned and heatedly complained that Acme had been sold and Kearney had not informed him of what had occurred. Kearney apologized for his failure personally to contact Fitzgibbons, explaining that he had assumed that presidential assistant Lou Maloof had relayed the information to Fitzgibbons as a result of their telephone discussion on June 14. During their conversation, Kearney repeated what he had told Maloof, namely, that the Holyoke station had been scheduled for closure on June 16 and that the San Antonio and Houston terminals would be abolished on June 30. Kearney also assured Fitzgibbons that Acme would pay all employees their severance benefits as required under the contract. Fitzgibbons then requested that Kearney mail to the former a letter describing the sale of Acme. In conformity with this request, Kearney dispatched a letter to Fitzgibbons on June 22 which stated:

This will confirm the information I relayed to you today on the telephone that on June 12, 1978, ABC Freight Forwarding Corporation purchased all of the issued and outstanding capital stock of Acme Fast Freight, Inc., [and] as of that date, owns and controls Acme.

ABC Freight Forwarding Corporation has been notified, prior to the purchase, of the existence of all collective-bargaining agreements, including the one with the [Union.]

Kearney promised to meet with Fitzgibbons at any time to further discuss any problems which the union official might have. According to Kearney, Fitzgibbons made no response to the information which had been relayed to him.

On June 26, notices were posted and given to the employees and Union chairman at the Portland station, informing them that that terminal would be abandoned on June 30 and, on June 27, similar notices were issued concerning the closure of the terminals in San Antonio and Houston.

In July, Kearney and Fitzgibbons engaged in several telephone conversations in an attempt to arrange their schedules so that they could meet. During the week of July 3, and in the course of one of these conversations, Kearney advised Fitzgibbons of Acme's intention to terminate operations at the Boston station. Kearney's testimony is uncontradicted, and I find that Fitzgibbons interposed no specific objection to this action. The record discloses that notices to this effect were given to the usual parties on July 7, and the terminal was closed on July 14.

The parties agreed to meet on July 26. In the meantime, Acme gave notices to the employees and union chairmen at Maspeth, Boston, and Detroit on July 6, 7, and 11, respectively, informing them of the closing of these terminals on July 11, 14, and 15, respectively. On July 18, the Union filed the charges giving rise to this proceeding. When the meeting opened on July 26, Kearney and Barsky represented management, and Fitzgibbons and Union Vice President Albert Vollero appeared on behalf of the Union. At the outset, Kearney gave a recital of what had occurred in the past, mentioning the sale of Acme to ABC-FFC and the closure of the terminals. According to Kearney, Vollero complained that Acme had failed to notify the Union that the stations would be abolished, and Kearney insisted that Acme had followed the long-established practice of closing the terminals upon appropriate notice to the employees and the union chairmen. Kearney added that he had notified and discussed these matters with Fitzgibbons both during his conversation with that union officer on June 6 and on several occasions thereafter. The subject then turned to certain outstanding grievances which had arisen as a result of the closures, and it was agreed that Vollero would draft a list of those complaints to be considered at a later session. Finally, an issue arose as to the status of the employees whose jobs had been abolished with the closure of the Maspeth station. With regard to this topic, Vollero insisted that these employees should be transferred to the terminal at 24th Street and Eleventh Avenue in New York City which ABC operated and housed the offices of ABC and ABC-FFC. Kearney pointed out that the bulk of the Maspeth freight had been rerouted to the North Bergen terminal and that the Maspeth employees were listed on the North Bergen seniority roster and were entitled to employment at that installation. Thereupon, the meeting broke up.

After an exchange of correspondence regarding the grievances which were to be expedited, the parties again sat down in late September or early October to resolve the issues which arose out of the abolition of jobs when the seven terminals were eliminated. Kearney testimonially reported that, at this session, Fitzgibbons contended that Acme had made an error in closing the terminals. Kearney denied that Acme had transgressed any of the established procedures set forth in the existing labor agreement or had deviated from past practice in shutting the stations down. The matter of the Portland closing was broached by Fitzgibbons, who claimed that the employees at that terminal had not been afforded the contractually mandated notice of termination. After exploring this topic, Kearney conceded that the requisite notice had not been given and agreed to compensate the employees for any irregularity. The discussion

then turned to the closure of the Maspeth terminal, with Fitzgibbons insisting that the work at this abandoned station should be diverted to ABC's dock at 24th Street and Eleventh Avenue in New York City rather than to Acme's terminal in North Bergen, New Jersey. Kearney replied that the bulk of the Maspeth freight had been shunted to North Bergen for the same reason that Acme had transferred the work to that terminal when Acme previously closed its terminals on Watt Street, Greenpoint, and Woodside, in New York City. In this regard, Kearney explained that a small fraction of the Maspeth freight would be handled at the Eleventh Avenue address because some of the Maspeth employees, who had contractual bumping rights and were eligible to follow the work to North Bergen, refused to leave New York City. Finally, Fitzgibbons complained that Acme's terminals in San Antonio and Houston had, in reality, been merged with ABC's stations in those cities and had not, in fact, been abandoned. Kearney emphatically denied that Acme had transferred any work to ABC in those locales, and the meeting concluded.

In his testimony, Union President Fitzgibbons sought to convey the impression that he was unaware of any practice which had developed over the years whereby the Union had acquiesced in the closing of Acme's terminals upon notification to the affected employees and their local union chairmen. To bolster this impression, Fitzgibbons testimonially reported that he first became involved in the administration of the Acme labor contract in 1973 and that no Acme terminals had been closed during the period from 1973 up to the events giving rise to this proceeding. However, this assertion is belied by the record which clearly establishes that Acme had closed its terminal in Buffalo, New York, on April 22, 1977, and had shut down terminals in Providence, Rhode Island, and Worcester, Massachusetts, as late as February 24, 1978. So far as appears on this record, Fitzgibbons did not protest any failure of notification by Acme regarding these closures, nor did he request that Acme bargain with the Union over its decision to phase out these stations. In light of his testimony that the employees at the seven terminals involved herein regularly reported Acme's notices of closures to him or his assistants, I deem it implausible that Fitzgibbons could have been unaware of Acme's past practice in shutting down its facilities, particularly in view of the circumstance that the multiple closings in early 1978 occurred less than 4 months before Acme began to phase out the seven stations in June.

Nor do I accept Fitzgibbons' testimony that he did not personally receive prior notification of the intended closure of the terminals which Acme implemented in June and July. Albert Vollero, the union vice president, testified that he had discovered as early as May and June through conversations with terminal managers and employees, that many of these terminals had been programmed for closure and that he relayed this information to Fitzgibbons prior to the closings. After fencing with counsel, Vollero finally brought himself to admit that he had received a telephone call from Acme's Vice President, Philip Carusi, who reported that Acme was contemplating shutting down the San Antonio and Houston stations and that Acme would faithfully comply with contractual provisions relating to the effects of the terminations upon the employees. Upon re-

ceipt of this information, Vollero replied that he had no objection to this procedure. Moreover, Carusi's testimony is undenied and I find that on July 7, when notices of closure of the Boston and Maspeth terminals were posted, Carusi contacted Vollero and informed the latter that the Boston and Maspeth facilities were scheduled to be phased out within a week. In short, I am convinced and I find that Acme did, in fact, notify the Union of its intention to eliminate the seven terminals in question prior to their abandonment.

Moreover, I do not accept Fitzgibbons' testimony that he had made timely requests upon Acme to bargain over its decision to phase out these seven facilities. While on the stand, Fitzgibbons acknowledged that he had learned during his meeting with Kearney and Barsky on June 6 that Acme had intended to close the terminals in Maspeth, Holyoke, Boston, and the West coast. Fitzgibbons claimed that, when he was unable to extract any concession from Barsky that his employer, ABC-FFC, would honor the existing agreement between Acme and the Union, he demanded that "before they made any changes, that they would sit down with the Union, and inform us of those changes, so we would have an opportunity to discuss them." Fitzgibbons also claimed that he had made additional requests to bargain over the closures at his meeting with Acme representatives on July 26, despite the fact that all seven terminals had already been eliminated for several weeks. When pressed on this issue, Fitzgibbons made the curious confession that he did not even ask Acme's officials to negotiate over the resumption of operations at those facilities.

In my opinion, Fitzgibbons' only concerns when he learned that Acme had been sold to ABC-FFC and that Acme had opted to close the seven stations to curb severe financial losses and remain in business, and was to obtain a guarantee that the Union's contract with Acme remained a viable instrument after that enterprise's acquisition by ABC-FFC, and to gain the assurance that the contractual provisions relating to the abandonment of terminals would be faithfully followed. After reviewing Fitzgibbons' testimony against the backdrop of the entire record, I am convinced that, when it became apparent to him that he had acquiesced in the past practice involving closures of Acme terminals by requesting negotiations over the effects of the closings upon the employees rather than the decision to close the facilities, he thereupon tailored his testimony to make it appear that Acme had actually rejected his demand to bargain on the latter score. In sum, I credit the testimony of Kearney and Barsky where it collides with that of Fitzgibbons on this score, and I find that Fitzgibbons did not insist that Acme sit down and bargain over its decision to close the seven terminals here in question and thereby waived his right to do so.⁴

As chronicled above, the General Counsel contends that Acme and ABC violated Section 8(a)(5) of the Act by refusing to bargain with the Union over its decision to close the seven stations. At the hearing, the General Counsel conceded that the closures were prompted solely out of economic necessity and did not bear overtones of antiunion motivation. He further acknowledged that Respondents

⁴ See *New York Mirror, Division of the Hearst Corporation*, 151 NLRB 834, 840 842 (1965).

had faithfully discharged their duty to bargain over the effects of the closures upon the employees involved. Accordingly, the sole issues presented for resolution regarding the closing of Acme's terminals is whether the Respondents had fulfilled their duty to bargain with the Union over the decision to shut the terminals down.

In *Ozark Trailers, Incorporated and/or Hotco Equipment Company and/or Mobile Freeze Company, Inc.*,⁵ and more recently in *Brockway Motor Trucks, Division of Mack Trucks, Inc.*,⁶ the Board reiterated its interpretation of the U.S. Supreme Court's decision in *Fibreboard Paper Products Corp. v. N.L.R.B.*,⁷ as imposing a duty upon an employer to bargain with the collective-bargaining representative of his employees over a decision to close a portion of his business for economic reasons. In *Brockway*, the Board explained:

The underlying rationale for requiring bargaining over such matters is that the union—on behalf of and as representative of the employees—should be accorded an opportunity to engage in a full and frank discussion regarding such decisions. In this way parties are presented an opportunity to explore possible alternatives to accommodate their representative interests and thereby to resolve whatever issue confronts them in a mutually acceptable way.⁸

In the instant case as heretofore found, the union received timely notice from Acme of the latter's intention to close seven terminals throughout the country both from the lips of Acme's Vice President Kearney as well as from Carusi, and also from the affected employees. Despite the fact that Acme's representatives willingly met with the Union agents on two occasions and otherwise contacted these agents in several instances before and after the closures, and thus afforded the Union "an opportunity to engage in a full and frank discussion" regarding the decision to abandon the stations, I find that Union President Fitzgibbons knowingly waived his statutory right to confront Acme's management and explore the possibility of altering that decision. In light of this circumstance, I am persuaded and conclude that Respondents Acme and ABC did not violate Section 8(a)(5) of the Act by failing to notify the Union and bargain with it over its decision to close its terminals.⁹

There remains for consideration the General Counsel's final contention that Respondents Acme and ABC violated

Section 8(a)(5) of the Statute by refusing to bargain with the Union over the transfer of the work formerly performed at Acme's abandoned terminals to ABC's stations located in the same cities.

Apart from argumentative assertion, the General Counsel has failed to grace the pages of this record with any probative evidence which even remotely suggests that such a transfer of work had occurred at the terminals which Acme closed in Holyoke, Boston, San Antonio, Houston, Portland, or Detroit. With respect to the Maspeth station, the evidence discloses and I find that, with the abandonment of that terminal, Acme undertook to transfer its freight forwarding functions to the North Bergen, New Jersey, station as it had done when the New York City stations at Watt Street, Greenpoint, and Woodside were closed out of economic necessity. In addition, Acme afforded an opportunity for the Maspeth employees to exercise their contractual bumping rights at North Bergen. However, some of the truckmen employed at Maspeth because of the distance involved, refused to make their freight deliveries from the New York Counties of Suffolk, Nassau, and Queens, which Maspeth formerly serviced, to the North Bergen terminal. To handle that freight, which constituted only a fractional portion of the Maspeth volume, and to avoid further losses, Acme entered into a "co-load" agreement with ABC under which the freight was delivered to ABC's Eleventh Avenue terminal in Manhattan for joint shipment. These arguments, which are filed with the ICC, are not unusual in the industry, for Kearney testified without contradiction and I find that Acme had such agreements with carriers other than ABC throughout the country. Under their terms, both carriers utilize a single truck to carry freight out of the same city to another distant location. In view of the refusal by some Maspeth drivers to follow their work to the North Bergen terminal, a privilege which was accorded to them under the labor agreement between the Union and Acme, I am not convinced that Acme's entry into a co-load agreement with ABC constituted a transfer of unit work from the abandoned Maspeth terminal which constituted a statutory subject of collective bargaining. I shall therefore dismiss this allegation from the complaint.

Having found that Respondents Acme and ABC did not violate Section 8(a)(5) of the Act by closing the seven terminals here in question or by transferring unit work without first bargaining with the Union over their decision to do so, I shall order that the complaint be dismissed in its entirety.

ORDER¹⁰

It is hereby ordered that the complaint herein be, and it hereby is, dismissed in its entirety.

¹⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, as amended, 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.

⁵ 161 NLRB 561 (1966).

⁶ 230 NLRB 1002 (1977).

⁷ 379 U.S. 203 (1966).

⁸ 230 NLRB at 100.

⁹ Although the record establishes that the decision to abandon the seven stations was prompted solely because of the severe economic losses which Acme was sustaining, Respondents have seemingly not advanced the contention in this proceeding that the closure was legally privileged, even absent bargaining over the decision, because the determination to close involved such a "significant investment or withdrawal of capital" as to "affect the scope and ultimate direction of the enterprise." See *General Motors Corp., GMC Truck & Coach Division*, 191 NLRB 951, 952 (1971).