

Beulah Rowden
Josephine Munoz
Mattie Clark
Winona Whalen
Lena Capello

Bernice Balmanski
Ann Senger
Maria Gutierrez
Gladys Saldana
Henrietta DeLeon

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate against any employee because of membership in or activity on behalf of any such labor organization.

IRVING LAMBERT, MURRAY B. LAMBERT,
SEYMOUR LAMBERT, D/B/A SUE-ANN
MANUFACTURING COMPANY

Employer.

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

KATZ DRUG COMPANY and WAREHOUSE AND DISTRIBUTION WORKERS,
LOCAL 688, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
AFL. Case No. 14-CA-585. March 28, 1952

Decision and Order

On September 6, 1951, Trial Examiner Horace A. Ruckel issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report. Both the General Counsel and the Respondent filed briefs.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the Trial Examiner's findings of fact and finds merit to the exceptions to his conclusions and recommendations to the extent indicated in this Decision and Order.

The Trial Examiner found that the Respondent had not violated Section 8 (a) (1) of the Act, as alleged in the complaint, by soliciting from its employees individual affidavits in which the affiant expressly denied membership in, or authorized representation by, the Union.¹ In making this finding the Trial Examiner relied upon the Board's well-established rule that an employer may lawfully interrogate its employees, where such interrogation is a necessary part of its defense to charges of unfair labor practices and is strictly limited to the scope of the issues raised in the complaint.² This rule is an exception to the Board's normal rule that interrogation of employees concerning their union membership is *per se* interference with, restraint, and coercion of employees within the meaning of Section 8 (a) (1).³ The Respondent contends, and the Trial Examiner in dismissing the complaint agrees, that the interrogation of Respondent's employees in this case brings it within the exception to the rule against interrogation, as expressed in *Joy Silk Mills v. N. L. R. B.*⁴ We do not agree.

The circumstances of this case are substantially different from the *Joy Silk Mills* case and other decisions upon which the Respondent relies. Here the record reveals that 280 of the Respondent's employees were asked by the Respondent's personnel manager or one of its district managers to read the prepared affidavit, with no explanation of its purpose or the use to which it would be put, and to sign or not, as they wished. One of the employees testified that she signed the affidavit in the store manager's office. Another employee testified that he signed at the store counter. The signing of the affidavits was accomplished while the Respondent's stores were being picketed by the Union. The Respondent asserts that the solicitation of these affidavits was necessary to secure evidence in support of its suit in the Missouri courts to enjoin the Union from maintaining pickets and compelling recognition from the Respondent as the bargaining representative of its employees. It appears that Missouri forbids picketing activities to secure recognition where the picketing union does not

¹ The text of the affidavit is as follows:

Each of the undersigned, being first duly sworn upon his or her oath, deposes and states that he or she is an employee of the Katz Drug Company, working in the store located at (address of store); that he or she is not a member of Warehouse and Distribution Workers Union, Local 688, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L.; that he or she has not authorized said Union to represent him or her for the purpose of collective bargaining; and that said Union does not represent him or her for the purposes of collective bargaining, or for any other purpose.

² For example, *May Department Stores Company, a corporation, d/b/a Famous-Barr Company*, 70 NLRB 94; *N. & W. Overall Company, Incorporated*, 51 NLRB 1016; *Richard F. Kline*, 39 NLRB 1047.

³ For a discussion of this doctrine, see *Standard-Coosa-Thatcher Company*, 85 NLRB 1358.

⁴ 85 NLRB 1263, enfd. 185 F. 2d 732.

represent a majority of the employer's employees.⁵ To establish this fact the Respondent sought these affidavits from its employees. It is undisputed on the record, however, that the Union, in its first conference with the Respondent on December 7, 1950, admitted that it did not represent a majority of the employees. This admission was repeated by union officials during a meeting of its Local on December 9, in the presence of representatives of the Respondent. The affidavits, in fact, were never used by the Respondent in the court proceedings because the Union admitted during the court hearing, as it had previously admitted to the Respondent, that it did not represent a majority of the employees.

The Trial Examiner nevertheless found that the Respondent, having limited its interrogation to the scope of the issues in the injunction proceedings, was privileged to seek the affidavits, under the *Joy Silk Mills* and other decisions. He regarded the Respondent's failure to make any explanation to its employees when it submitted the affidavits to them as a question relating solely to illegal motivation, which the parties had stipulated was not an issue in this case. As to the Union's admission of the fact sought to be established by the affidavits, the Trial Examiner held that the Respondent had "no sure foreknowledge" that the Union would repeat this admission in court.

An exception, however, such as the one applied in *Joy Silk Mills* to the general rule guaranteeing employees their right to be free from unlawful interrogation, must be narrowly applied. As the court in that case stated, a limited amount of such questioning may be permitted in fairness to the employer. But each case must be carefully scrutinized on its facts, lest undue license to employers result in substantial interference with the rights of employees protected by Section 7 of the Act. An employee confronted by his superior with an affidavit in which he is asked to swear that he is not a member of a union seeking to represent him, while that union is engaged in picketing the employer as part of an organizing campaign, might reasonably conclude that his election not to sign would bring swift economic reprisal. The Respondent in this case, contrary to the implications of the dissent, made no attempt to allay these natural fears, nor could it possibly have violated Section 8 (a) (1) by doing or saying the little more that would have been necessary for that purpose. Instead, it gave its employees no explanation of any nature; it merely asked them to sign or not, as they wished. Regardless of the Respondent's actual motiva-

⁵ In view of our decision herein, we find it unnecessary to consider whether the Employer's invocation of the Missouri law against this type of picketing, which seems to go beyond the restrictions contained in the amended Act, would itself warrant a decision contrary to the Trial Examiner's recommendation.

tion,⁶ we are of the opinion and find that the Respondent's interrogation of its employees, the normal coercive effect of which was unmitigated by any explanation, was not privileged by the exception to the Board's rule against interrogation set forth in the *Joy Silk Mills* and other cases.⁷ Indeed, in view of the Union's repeated admissions of the fact sought to be established by the Respondent's interrogatory affidavits, we also are not persuaded that such interrogation was, in any event, necessary to the Respondent's injunction proceeding in the Missouri courts.

Accordingly, we find that the Respondent, by soliciting these affidavits in the manner set forth above, and in view of the Union's admissions that it did not, in fact, represent a majority of the employees, violated Section 8 (a) (1) of the Act.

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Katz Drug Company and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogation of its employees concerning their membership in and activities on behalf of Warehousemen and Distribution Workers, Local 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, or in any other labor organization of its employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Warehouse and Distribution Workers, Local 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in con-

⁶ Our dissenting colleague stresses the absence of any intent by the Respondent to violate the Act. And, by characterizing the Respondent's questions as "lawful per se," he is presumably also emphasizing the fact that these questions were unaccompanied by threats or promises of benefit. But both of these considerations are beside the point, for the Board's concern in interdicting interrogation is with the coercive effect which such conduct has upon employees, and with the manner in which interrogation injects the employer into an area guaranteed by the Act as the exclusive concern of employees. As such, neither the lack of an unlawful intent nor the absence of threats or promises is material. That is precisely what the Board has meant when it has so often characterized interrogation as unlawful *per se*.

⁷ While it may be true, as the dissent states, that the Board in the *Joy Silk Mills* decision did not state in so many words that the rule of that case is qualified by a requirement that the employees be made cognizant of the purpose of the interrogation, the fact remains that in that case, and in others like it, that requirement was met. We believe that in cases, such as the instant one, where that requirement is not met, an exception to the usual ban on interrogation should not be found.

certed activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be effected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at its establishment in St. Louis, Missouri, copies of the notice attached hereto, marked "Appendix A."⁸ Copies of said notice, to be furnished by the Regional Director for the Fourteenth Region, shall, after being signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by other material.

(b) Notify the Regional Director for the Fourteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply therewith.

MEMBER MURDOCK, dissenting:

I cannot agree with my colleagues that the Respondent has violated Section 8 (a) (1) of the Act by the limited questioning of its employees with regard to a factual issue vital to its suit for an injunction in a State court.⁹

I do not believe that Congress intended the freedom from coercion and restraint granted employees in the Act to be carried to the point of denying employers the right to procure and submit evidence essential to a court action. Nor do I believe that this Board has the legal right to substitute its judgment for that of the employer and its attorneys as to what evidence is essential and relevant in its State court actions or as to the best means of procuring such evidence. The majority's decision does both.

Of course, an employer should not be allowed in its search for such evidence intentionally or unreasonably to invade the rights of its employees guaranteed in Section 7 of the Act. By stipulation of the parties it is agreed that the Employer in this case was not motivated by such unlawful intention and, as appears below, I do not think it can fairly be held that the Employer's conduct was unreasonable.

⁸ In the event that this order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order," the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

⁹ I shall not discuss the question relating to the jurisdiction of the Missouri State court as this issue was not raised by any of the parties and was not passed upon by the majority in their decision.

It has been, as the majority emphasize, a well-settled rule of this Board, with court sanction; that an employer may interview its employees to discover facts within the limits of issues raised by a complaint" . . . where the employer, or its counsel does not go beyond the necessities of such preparation to pry into matters of union membership, to discuss the nature or extent of union activity, to dissuade employees from joining or remaining members of a union, or otherwise to interfere with the statutory right to self-organization."¹⁰ In none of the cases setting forth this rule until today has it appeared that the employer must affirmatively state, in conjunction with its limited questioning, the nature and purpose of the questions. Indeed, the import of these cases would seem to be that the employer is most protected where it is least talkative. Presumably, the Respondent was aware of these cases and therefore carefully phrased its questions to bring them within the strict limits of the issues being litigated, carefully refraining from making any statements which might be interpreted as interfering with the rights of its employees under Section 7. It had no intention, the parties stipulated, to violate the Act by subjecting its employees to an unlawful type of interrogation. It desired only to avail itself of a privilege repeatedly affirmed by the Board and the courts in explicit language. But the Respondent, it now appears, acted at its peril when it relied upon this principle. Although its questions were admittedly lawful *per se*, the majority find for the first time that the exception to the rule against interrogation includes a condition precedent, a condition never before suggested in the cited cases and of which the Respondent could not have been aware. Previously, employers have been found to be in violation of the Act by talking too much; here the majority find that an employer has violated the Act by not talking enough.

I cannot concur in this interpretation of the Board's rule correctly set forth by the court in the *Joy Silk Mills* case. In my opinion, neither the lack of an explanation by the Respondent nor the Union's admission that it did not represent a majority of the employees are factors of such crucial importance to warrant distinguishing this case from the cases upon which the Respondent relies. It is clear that the Respondent attempted by every means in its power and in good faith to avoid a violation of the Act. I do not believe that the privilege it thought the Board had extended to it should prove to be nothing more than an enticement to a violation of Section 8 (a) (1).

I would therefore, in agreement with the Trial Examiner, dismiss the complaint in its entirety.

¹⁰ *May Department Stores Company, supra.*

Appendix A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT interrogate our employees concerning their union affiliations, activities, or sympathies, or in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Warehouse and Distribution Workers, Local 688 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act.

All our members are free to become or remain members of any labor organization or to refrain from such affiliation except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because he has engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

KATZ DRUG COMPANY,
Employer.

Dated-----

By -----
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Intermediate Report

Upon a charge filed on January 5, 1951, by Warehouse and Distribution Workers, Local 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., herein called the Union, the General Counsel of the National Labor Relations Board, herein called respectively the General Counsel and the Board, by the Regional Director for the Fourteenth Region (St. Louis, Missouri), issued his complaint dated July 3,

1951, against Katz Drug Company, herein called Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. A copy of the charge, the complaint, and a notice of hearing were duly served upon Respondent and the Union.

With respect to the unfair labor practices the complaint alleged, in substance, that Respondent from on or about December 9, 1951, interrogated its employees concerning their membership in and activity on behalf of the Union, thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Respondent filed its answer dated July 12, 1951, admitting certain allegations of the complaint with respect to the nature of its business, but denying that it had engaged in any unfair labor practices. As an affirmative defense Respondent asserts that, although it interrogated its employees concerning their union membership, it did so solely in order to obtain relevant and material evidence in a case then pending in the Circuit Court of Jackson County, Missouri, where Respondent was seeking an injunction against the picketing of its stores by the Union.

Pursuant to notice, a hearing was held on July 30, 1951, at St. Louis, Missouri, before Horace A. Ruckel, the undersigned Trial Examiner, duly appointed by the Chief Trial Examiner. The General Counsel, Respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues, was afforded all parties.

At the conclusion of the hearing the parties were advised that they might argue orally before the undersigned, and might file briefs with him by August 14, 1951. The parties waived oral argument. On August 13, 1951, the General Counsel and Respondent filed briefs. The undersigned granted without objection a motion by the General Counsel to conform the pleadings to the proof in formal matters. Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is and has been for many years a Delaware corporation having its principal office in Kansas City, Missouri, and several other establishments in Kansas City and St. Louis, and in various other States, where it is engaged in the business of selling and distributing various goods and merchandise including, among other things, drugs, clothing, household appliances, and hardware.

Respondent, during the course and conduct of its business at its St. Louis, Missouri, establishment, during the year 1950 purchased various materials consisting of drugs, cosmetics, sundries, candy, and tobacco valued in excess of \$1,000,000, of which more than 50 percent originated from points outside the State of Missouri. Respondent admits that it is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Warehouse and Distribution Workers, Local 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, A. F. L., is a labor organization admitting employees of Respondent to membership.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Alleged interference, restraint, and coercion*

The facts are simple and not in dispute. On December 8, 1950, the Union, although it did not represent a majority of Respondent's employees, picketed several of Respondent's stores and warehouses in Missouri, and displayed signs stating: "Katz Drug Company is non-union in St. Louis." It is asserted that a Missouri statute makes picketing unlawful when the Union does not represent a majority, at least where the purpose of the picketing, as Respondent contends was the situation here, is to compel or persuade an employer to enter into a contract with a union or otherwise accord it recognition. Whether this is a correct statement of the law need not concern us here. On December 8, Respondent filed suit in the Circuit Court of Jackson County, Missouri, seeking a restraining order against the Union and certain of its officers and agents. The order was issued and the defendants were called upon to show cause on December 13 why an injunction should not be entered.

At the hearing on December 13, the defendants filed their answer in which they admitted that the Union did not represent a majority of Respondent's employees. The circuit court found a violation of the law and issued an injunction restraining the defendants from further picketing. By reason of the answer of the defendants it became unnecessary for Respondent to file various affidavits which its representatives had obtained from its employees, the obtaining of which is the sole ground upon which the complaint rests.

The affidavits in question were sought from all of the employees and obtained, apparently, from 380 of them. They were substantially in the following form:

Each of the undersigned, being first duly sworn upon his or her oath, deposes and states that he or she is an employee of the Katz Drug Company, working in the store located at (address of store); that he or she is not a member of Warehouse and Distribution Workers Union, Local 688, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L.; that he or she has not authorized said Union to represent him or her for the purpose of collective bargaining; and that said Union does not represent him or her for the purpose of collective bargaining, or for any other purpose.

When the employees were presented with a copy of the above affidavit they were asked to read and sign it, or not sign it, as they wished. There was no further conversation between the employees and Respondent's representative who solicited the affidavits.

Conclusions

The General Counsel contends that Respondent violated the Act in procuring the affidavits of employees under these circumstances. Specifically, he points out that the employees were not told the purpose of the affidavits, or assured that they had a right to join or not to join a labor organization as they saw fit. He further urges, and it is a fact, that at conferences on December 7 and 9, at which representatives of Respondent and the Union were present, the latter informed the former that they did not represent a majority of the employees at that time although they expected to in the future. In view of this admission the General Counsel argues that it was not necessary to procure the affidavits since the critical fact in the injunction case was admitted.

I disagree with these contentions. With respect to the second one, Respondent's counsel could not reasonably have been expected to rely upon out-of-court

declarations of a union representative as a method of proving the principal point in its case. The Union's answer was not filed until its appearance in court on December 13. While it did admit that the Union did not represent a majority of defendant's employees, Respondent had no sure foreknowledge that it would do so. To meet the eventuality of the Union's asserting otherwise, it was incumbent upon counsel in preparing their case to support the petition for an injunction by proper evidence. Such evidence customarily takes the form of affidavits, with or without the testimony of witnesses.

With respect to the General Counsel's contention that Respondent should have informed its employees of the purpose of the affidavits and assured them that they had the right to join or refrain from joining a labor organization, doubtless this would have been desirable. If there were other substantial evidence of interference it might possibly be contended that Respondent, in failing to state its purpose and to give such assurances, was endeavoring to intimidate its employees under the guise of preparing its lawsuit. But there is no such other evidence in the record. Moreover, it was stipulated at the hearing that Respondent had no "subjective intent to interfere with, restrain, or coerce" its employees, "in their rights guaranteed under Section 7 of the Act."

Under the circumstances of this case, I find that Respondent's procuring of these affidavits comes within the exception to the general rule that an employer may not inquire as to the union affiliations of its employees. This exception has been established in various decisions of the Board. As described in the *Joy* case¹ it is "whether the information elicited was within the scope of the issues raised by the complaint, and if not whether the inquiries under the circumstances in which they were made, constituted interference, restraint and coercion." In that case the Board found that some of the inquiries were not confined to the scope of the issues, but pertained to such matters as the payment of membership and other fees, agreement as to future dues, and such subjective matters as the employees' understanding of the purpose and effect of union membership cards and whether he had voted freely in a Board election. Such factors are not present here. The information solicited by Respondent was, in my opinion, clearly within the scope of the issues in the injunction proceeding and it was confined thereto.

I find that Respondent, by soliciting affidavits of its employees as to their union membership and activity, did not engage in interference, restraint, and coercion within the meaning of the Act.

CONCLUSIONS OF LAW

1. Warehouse and Distribution Workers, Local 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L. is a labor organization within the meaning of Section 2 (5) of the Act.

2. Respondent, Katz Drug Company, is, and at all times relevant herein was, engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

3. Respondent has not engaged in any unfair labor practice within the meaning of the Act.

[Recommendations omitted from publication in this volume.]

¹ *Joy Silk Mills v. N. L. R. B.*, 185 F. 2d 732, enforcing 85 NLRB 1263