

3. By restraining and coercing employees of the Company in the exercise of rights guaranteed by Section 7 of the Act, the Respondent has engaged in and is engaging in, unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

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

[Recommendations omitted from publication.]

Appendix A

NOTICE TO ALL MEMBERS OF LOCAL 140, BEDDING, CURTAIN & DRAPERY WORKERS UNION, UNITED FURNITURE WORKERS OF AMERICA, CIO, AND TO ALL EMPLOYEES OF THE ENGLANDER COMPANY, INC.

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT cause or attempt to cause The Englander Company, Inc., to discriminate against employees in the bargaining unit represented by it, by requiring the Company to contribute sums of money to The Local 140 Security Fund for the purpose of providing benefits to employees in said unit, unless provision is made in the administration and operation of said Fund, or otherwise, for the payment of benefits on a nondiscriminatory basis without regard to the membership status, or want of it, of employees in the bargaining unit.

WE WILL NOT take any action or engage in any conduct in relation to The Local 140 Security Fund, or otherwise, that is calculated to deny or withhold from any employee in the said bargaining unit, because of lack of good-standing membership in the Union, the payment to him of any benefits that would otherwise be due and payable to him from said Fund.

WE WILL NOT in any other manner cause or attempt to cause the Company to discriminate against any of its employees with regard to their hire or tenure of employment or terms or condition of employment, except under the conditions and upon the ground expressly authorized by Sections 8 (a) (3) and 8 (b) (2) of the Act.

WE WILL NOT by means of the foregoing, or in any like or related manner, restrain or coerce employees in the exercise of their right to engage in or refrain from any or all concerted activities listed in Section 7 of the Act, 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 by Section 8 (a) (3) of the Act.

WE WILL make Annette Ciervo Scandariato whole for any loss of money she may have suffered as the result of the discriminatory denial or withholding of benefits due and payable to her from The Local 140 Security Fund.

WE WILL take all necessary steps within our control to effectuate the restoration to Marie F. Kuhlman, Annette Ciervo Scandariato, and Margaret Karle of all rights of said employees to participate in the benefits of said Fund.

LOCAL 140, BEDDING, CURTAIN & DRAPERY WORKERS UNION, UNITED FURNITURE WORKERS OF AMERICA, CIO, Labor Organization.

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.

SYMNS GROCER CO., AND IDAHO WHOLESALE GROCERY CO. and TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS UNION, LOCAL No. 983, AFL. Case No. 19-CA-481. July 23, 1954

Supplemental Decision and Amended Order

On March 16, 1953, the Board issued a Decision and Order in the above case (103 NLRB 622), in which it found, in agreement with the 109 NLRB No. 58.

Trial Examiner, that the Respondent Symns Grocer Co., by conduct culminating on April 13, 1951, had violated Section 8 (a) (1), (3); and (5) of the Act; that the Respondent Idaho Wholesale Grocery Co., a subsidiary of a competitor of Symns, had purchased its business on July 25, 1951; that, although the sale was not made to evade Symns' liability under the Act, and although Idaho, itself, had not engaged in any unlawful acts, Idaho was responsible for remedying the unfair labor practices of Symns. In holding Idaho responsible as a successor under the foregoing circumstances, the Board relied on the rule of the *Alexander Milburn*<sup>1</sup> case. A petition to enforce the Board's order was filed in the United States Court of Appeals for the Ninth Circuit.

In *Alexander Milburn* and later cases<sup>2</sup> the Board held that even a bona fide purchaser of a business is responsible for remedying his predecessor's unfair labor practices if he buys the business with knowledge of a Board proceeding against his predecessor on account of such unfair labor practices, and if he continues to operate the business with the same supervisory personnel, and without any discernible change in labor policy.

However, after the Board's decision herein, the Court of Appeals for the Tenth Circuit in the *Birdsall-Stockdale*<sup>3</sup> case held that the mere fact that a bona fide purchaser, as in the instant case, bought a business with knowledge of an 8 (a) (5) proceeding against the seller and continued to operate the business with the same personnel was not sufficient to charge the buyer with responsibility for remedying the seller's unfair labor practices. Enforcement of a Board order requiring the purchaser to bargain with the union was therefore denied. The court, in effect, rejected the Board's *Alexander Milburn* doctrine that even a bona fide successor may under certain circumstances be required to remedy the unfair labor practices of its predecessor.

In the light of the foregoing, the Board deemed it advisable to reexamine its *Alexander Milburn* doctrine as applied to the instant case. To this end, the Board on February 11, 1954, filed with the United States Court of Appeals for the Ninth Circuit a motion for leave to withdraw without prejudice its petition to enforce its Order herein. On February 15, this motion was granted. The case was thus returned to the Board.

Having reexamined the legal basis for its determination in the original Decision herein that Idaho was responsible for remedying the unfair labor practices of Symns, the Board now believes that it

<sup>1</sup> *The Alexander Milburn Company*, 78 NLRB 747.

<sup>2</sup> E. g., *Autopart Manufacturing Co.*, 91 NLRB 80, 81.

<sup>3</sup> *N. L. R. B. v. Birdsall-Stockdale Motor Co.*, 208 F. 2d 234. Accord: *N. L. R. B. v. Lunder Shoe Corp.*, 211 F. 2d 284 (C. A. 1).

lacks any statutory authority to make such a determination. Section 10 (c) of the Act empowers the Board to require unfair labor practices to be remedied by those persons who have engaged in such practices. No provision of the Act authorizes the Board to impose the responsibility for remedying unfair labor practices on persons who did not engage therein. The Supreme Court in the *Regal Knitwear*<sup>4</sup> case indicated that the Board's power to issue orders binding on the successors and assigns of respondents before the Board was limited by rule 65 of the Federal Rules of Civil Procedure.<sup>5</sup> In defining the classes of persons bound by orders of Federal courts against parties to litigation therein, that rule does not, in our opinion, reach persons who purchase the business of a party litigant under the conditions governing Idaho's purchase of Symns' business in the instant case. We conclude, therefore, that there is no statutory warrant for that portion of the Decision and Order herein which found Idaho responsible for remedying, and directed it to remedy, the unfair labor practices of Symns.<sup>6</sup> We, therefore, find, for the reasons stated above, that Respondent Idaho Wholesale Grocery Co., is not responsible for remedying the unfair labor practices of Respondent Symns Grocer Co., and any finding or conclusions to the contrary in our original Decision herein are hereby vacated and set aside. In conformity with this finding, we will amend our Order herein by deleting all those provisions requiring Idaho Wholesale Grocery Co. to remedy Symns' unfair labor practices. We will also make certain other changes in that Order insofar as it relates to Symns, which changes are made necessary by the elimination of any responsibility on the part of Idaho. The nature of these changes is indicated in the discussion of "The Remedy" below and in the succeeding Amended Order.

#### THE REMEDY

Having found that Respondent Symns is alone responsible for remedying its violations of Section 8 (a) (1), (3), and (5) of the Act, we will order that it cease and desist from such unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

With regard to the refusal of Symns to bargain with the Union in good faith, we will require, as in our original Order herein, that Symns, upon request, bargain collectively with the Union as the rep-

<sup>4</sup> *Regal Knitwear Company v. N. L. R. B.*, 324 U. S. 9, 13-14.

<sup>5</sup> Rule 65 provides: "Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice of the order by personal service or otherwise."

<sup>6</sup> The Board's decision in the *Alexander Milburn* case, *supra*, is overruled to the extent that it is inconsistent herewith. *Member Murdock*, who joins in overruling *Alexander Milburn*, notes that he dissented in that case.

representative of the employees at the Idaho Falls store, but only if and when Symns may resume the management of that store.

With regard to Symns' duty to reinstate the employees found to have been discriminated against at the Idaho Falls store, we will treat that store as part of Symns' entire operations, and require it to offer reinstatement to such employees in their former positions at the Idaho Falls store, if now operated by Symns; otherwise, to offer them reinstatement in substantially equivalent positions in any other stores that may be operated by Symns. Those of the employees to be offered reinstatement for whom no employment is immediately available, shall be placed upon a preferential hiring list, prepared in accordance with such rules of seniority as have heretofore been applied in the conduct of Respondent's business, and they shall, thereafter, in accordance with such list, be offered reemployment in positions substantially equivalent to their former positions as such employment becomes available at any of Symns' stores and before other persons are hired for such work.

We will also require the Respondent Symns to make whole the employees discriminated against for any loss of pay they may have suffered by reason of such discrimination, by paying to each of them an amount equal to that which he normally would have earned as wages from the date of the discrimination against him to the date of the Respondent Symns' compliance with the reinstatement provisions of our Amended Order herein, less any net earnings<sup>7</sup> in other employment during said period. Such computation shall be made on a quarterly basis, in accordance with the rule announced in *F. W. Woolworth Co.*, 90 NLRB 289.

However, as we are now modifying the remedy recommended in the Intermediate Report, which was adopted in the Board's original Decision and Order herein,<sup>8</sup> we will exclude, in computing back pay, the period beginning with the date of issuance of the Intermediate Report herein and ending 5 days from the date of issuance of this Supplemental Decision and Amended Order.

We will also require that, in offering reinstatement at any of its stores outside Idaho Falls, Symns offer to pay the employees involved any necessary and reasonable expense of moving themselves, their families, and household effects, to the vicinity of the store in which they are offered reinstatement.

<sup>7</sup> See *Crosssett Lumber Co.*, 8 NLRB 440; *Republic Steel Corp. v. N. L. R. B.*, 311 U. S. 7

<sup>8</sup> The Intermediate Report recommended, and the Board's Decision and Order required, that Symns (and Idaho) offer to reinstate the discriminatees "to their former or substantially equivalent positions" This might reasonably have been construed to mean that an offer of reinstatement to their positions at the Idaho Falls store would alone meet this requirement. As Symns had sold this store to Idaho, Idaho alone, and not Symns, was in a position to comply with this provision, so construed. Accordingly, it would be inequitable, in our opinion, to assess back pay against Symns for the period during which it failed to comply with the foregoing recommendations and Order.

### Amended Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent Symms Grocer Co., its agents, successors, and assigns, jointly and severally, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, AFL, as the exclusive representative of the employees in the following appropriate unit with respect to wages, hours, or other conditions of employment:

All employees at the Idaho Falls operation of the Respondent Idaho Wholesale Grocery Co., excluding supervisors, as defined in the Act.<sup>9</sup>

(b) Discouraging membership in Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, AFL, or in any other labor organization of its employees by discriminating in regard to their hire or tenure of employment or any term or condition of their employment.

(c) Discriminatorily discharging or refusing to reinstate employees for the reason that they engaged in a strike or other concerted activities protected by the Act.

(d) In any other manner interfering with, restraining, or coercing employees, in the exercise of their right to self-organization, to form labor organizations, to join or assist Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, 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 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 Act.

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

(a) Offer to Lyle Carson, Charles Graves, Reed T. Ritchie, Donald Forbush, and Harris Ranson immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, as provided in the section of this Supplemental Decision and Amended Order entitled "The Remedy."

(b) Make whole the above-named employees in the manner set forth in the section of this Supplemental Decision and Amended

<sup>9</sup> The provisions of paragraphs 1 (a) and 2 (c) of this Order apply only insofar as Respondent Symms Grocer Co. may retain or reacquire control of the Idaho Falls operation.

Order entitled "The Remedy" for any loss of pay they may have suffered by reason of the Respondent Symns Grocer Co.'s discrimination against them.

(c) Upon request bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, AFL, as the exclusive bargaining representative of all the employees in the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment, or other conditions of employment, and if an agreement is reached, embody such understanding in a signed agreement.<sup>10</sup>

(d) Post at its stores copies of the notice attached hereto marked "Appendix A."<sup>11</sup> Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by Symns Grocer Co.'s representatives, be posted by it immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Symns Grocer Co. to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order what steps the Respondent Symns Grocer Co. has taken to comply herewith.

3. IT IS FURTHER ORDERED that so much of the complaint as alleged that the Respondent Idaho Wholesale Grocery Co. violated the Act, be, and it hereby is, dismissed.

MEMBER BEESON concurring specially:

I agree with the decision in this case except as to that portion of the remedy requiring Respondent to pay moving expenses of relocated strikers.

In my opinion such a remedy is unrealistic and impractical for all concerned and, if adopted as a general rule, will impose a financial burden sufficiently severe to be in the nature of punitive damages.

### Appendix A

#### NOTICE TO ALL EMPLOYEES

Pursuant to a Supplemental Decision and Amended 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 discourage membership in Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, AFL, or in

<sup>10</sup> See footnote 9, *supra*.

<sup>11</sup> 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 Supplemental Decision and Amended Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an order"

any other labor organization of our employees, by discriminating in regard to their hire or tenure of employment, or any terms or conditions of employment.

WE WILL NOT discharge, or discriminatorily refuse to reinstate, any of our employees for engaging in strikes or concerted activities protected by the Act.

WE WILL NOT in any other 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 Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, AFL, or any other labor organization, 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, 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 by Section 8 (a) (3) of the Act.

WE WILL offer to Lyle Carson, Charles Graves, Reed T. Ritchie, Donald Forbush, and Harris Ranson immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of discrimination against them.

WE WILL bargain collectively upon request with Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, AFL, as the exclusive representative of all employees in the bargaining unit described herein with respect to wages, rates of pay, hours of employment, or other terms or conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees in the Idaho Falls operation, excluding supervisors, as defined in the Act, as amended.<sup>1</sup>

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.

SYMNS GROCER Co.,  
*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.

<sup>1</sup> This provision will apply only if and when we resume the operation of our Idaho Falls store.