

**Food Fair Stores of Florida, Inc. and Local Union No. 282, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. Case No. 12-CA-441. October 1, 1959**

DECISION AND ORDER

On June 2, 1959, Trial Examiner William Scharnikow issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this proceeding to a three-member panel [Members Rodgers, Jenkins, and Fanning].

The Board has reviewed the rulings of the Trial Examiner made 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 brief, and the entire record in this case, and hereby adopts the findings,<sup>1</sup> conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in the 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, Food Fair Stores of Florida, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local Union No. 282, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other labor organization, by discriminatorily laying off any of its employees because of their union membership or activities, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing their employees in the exercise of the rights to self-organization, to form, join, or assist Local Union No. 282, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of

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<sup>1</sup> We do not adopt the finding of the Trial Examiner that James Davis "has worked as a butcher since 1937." The record indicates that Davis commenced his experience as a butcher in 1937, but that he had worked for 10 years as an electrician prior to his taking employment with the Respondent in March 1957. This modification does not, however, affect our conclusions.

their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and 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 Act.

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

(a) Offer James E. Davis immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make whole James E. Davis for any loss of earnings he may have suffered, or may suffer, by reason of the Respondent's discrimination against him, in the manner and to the extent set forth in the section of the Intermediate Report entitled, "The Remedy."

(c) Preserve and make available to the Board or its agents upon request, for examination or copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay and rights of reinstatement due under the terms of this Order.

(d) Post at its stores in the Florida west coast division, copies of the notice hereto attached marked "Appendix A."<sup>2</sup> Copies of said notice, to be furnished by the Regional Director for the Twelfth Region, shall, after being duly signed by the Respondent or its representatives, be posted by the Respondent immediately upon receipt thereof and 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 the Respondent to insure that said notices are not altered, defaced, nor covered by any other material.

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

<sup>2</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 Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

## 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, we hereby notify our employees that:

WE WILL NOT discourage membership in Local Union No. 282, Amalgamated Meat Cutters and Butcher Workmen of North

America, AFL-CIO, or in any other labor organization, by discriminatorily laying off employees, or by discriminating in any other manner against our employees in regard to their hire or tenure of employment or any term or condition of employment.

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, join, or assist the above-named Union, 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, and 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 Act.

WE WILL offer James E. Davis immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges, and will also make him whole for any loss of earnings suffered by him as a result of discrimination.

All our employees are free to become or remain members of the above-named Union, or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in, or activity on behalf of, any such labor organization.

FOOD FAIR STORES OF FLORIDA, INC.,  
*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 AND RECOMMENDED ORDER

STATEMENT OF THE CASE

The complaint alleges, but the answer of the Respondent denies, that the Respondent committed an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 61 Stat. 136, by discharging James E. Davis, one of its employees, on or about June 28, 1958, and thereafter refusing to reinstate him, thereby discriminating against him in regard to his hire and tenure of employment in order to discourage membership in the Union.

Pursuant to notice, a hearing was held in Tampa, Florida, on January 26, 1959, before me, the Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Respondent appeared by counsel and the Union by its representative, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. All parties waived oral argument at the hearing. The General Counsel and counsel for the Respondent have submitted briefs.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE RESPONDENT

The Respondent, Food Fair Stores of Florida, Inc., is a Florida corporation and a wholly owned subsidiary of Food Fair Stores, Inc., a Pennsylvania corporation which operates a chain of retail supermarkets in the States of New York, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, and Florida. The annual gross volume of Respondent's business exceeds \$500,000. I find that the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.<sup>1</sup>

##### II. THE LABOR ORGANIZATION INVOLVED

Local Union No. 282, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of the Act.

##### III. THE UNFAIR LABOR PRACTICES

###### A. Introduction

On June 27, 1958, the Respondent terminated its employment of James E. Davis, a butcher or meatcutter at its Clearwater store.<sup>2</sup> According to the Respondent, it laid off Davis because business had fallen off at the Clearwater store and Davis, as the least efficient butcher at the store, was the logical selection for layoff. According to the General Counsel and the Union, however, the Respondent discharged or laid off Davis because of his support of the Union's efforts to organize the Respondent's meat employees and to obtain certification by the Board as their exclusive bargaining representative in Case No. 12-RC-184.

###### B. *The representation proceeding and incidental events*

In June and July 1957, the Union began organizing the Respondent's meat employees at its Clearwater, Tampa, and St. Petersburg stores, the only three stores which the Respondent was then operating on the west coast of Florida. On August 5, 1957, the Union filed a petition with the Board's Regional Director at Tampa in Case No. 12-RC-184 for certification as the exclusive bargaining representative of these employees under Section 9(c) of the Act. By order issued on August 15, 1957, the Regional Director consolidated this case with another representation case (No. 12-RC-183) in which the Retail Clerks<sup>3</sup> had petitioned for certification as the exclusive bargaining representative of the Respondent's grocery employees in the same three stores.

Following a hearing in the consolidated cases, the Board on November 25, 1957, issued a Decision and Direction of Elections to be conducted by the Regional Director in both the grocery employees' unit claimed by the Retail Clerks in Case No. 12-RC-183 and in the meat employees' unit claimed by the Union in Case No. 12-RC-184.<sup>4</sup> At the election conducted by the Regional Director in the meat employees' unit on December 18, 19, and 20, 1957, the tally of ballots showed that 19 valid ballots had been cast by employees for representation by the Union and 33 against such representation, and that 10 additional ballots had been challenged.

Thereafter, the Union duly filed objections to the election.<sup>5</sup> On June 26, 1958, the Board, upon consideration of the objections and the Regional Director's report of his investigation thereof, issued a Supplemental Decision, Direction, Order, and Direction of Second Election.<sup>6</sup> In this Supplemental Decision, the Board found that certain conduct on the part of the Respondent had interfered with the elections

<sup>1</sup> *Food Fair Stores, Inc.*, 114 NLRB 521; *Food Fair Stores of Florida, Inc.*, 119 NLRB 608.

<sup>2</sup> Davis testified that Meat Manager Edward Mello laid him off on Friday, June 27, 1958. Although Mello at first testified that he believed it was on Saturday, June 28, he later agreed in this testimony that it might have been on Friday, June 27, and I so find.

<sup>3</sup> Retail Clerks International Association, Local #1636, AFL-CIO.

<sup>4</sup> 119 NLRB 608.

<sup>5</sup> The Retail Clerks, having lost the election in the grocery employees' unit, also filed similar objections to the election in that unit.

<sup>6</sup> 120 NLRB 1669.

and required the Board to set aside the election held in the meat employees' unit in Case No. 12-RC-184, and to direct a second election in that unit.

The Board reached this conclusion upon the following findings of fact, which I also make in the present proceeding pursuant to a stipulation submitted to me by the parties during the hearing:

. . . [I]nvestigation reveals that during the 10 days prior to December 18, the Employer's supervisors, Paul, Whitley, and Vanderlike, engaged in the following conduct: called an employee into the supervisor's office to inform him that he had been seen at a union meeting; informed an employee that the company would not continue to grant time off under union conditions; and promised a wage increase at a future time with the statement that the "company would do more for you than the union." These incidents all involved employees in the meat department unit. On December 17, within the 24 hour period immediately preceding the start of the election in the Tampa store, Supervisor Paul, summoned approximately 5 meat department employees into his office in the rear of the Tampa store, where he spoke to them for approximately 25 minutes, interrogating them concerning their feelings toward the union, stating that they could do as well for themselves without the union; promising that the Employer would give specific wage increases, the same increases as the Miami Food Fair employees would receive pursuant to wage negotiations between the Employer and the Meat Cutters; and that he hoped that they would vote.

On Wednesday, December 18, shortly before noon, Paul commenced a systematic effort to inform the employees in the meat department unit that specific wage increases had been put into effect on December 16, conforming to the increases negotiated for the Employer's East Coast stores in negotiations which were concluded on December 15. Paul spoke in his office to each of the meat department employees at the Tampa store on December 18, during the hours set for voting of the employees of that store, informing the employees exactly how the wage increases affected them individually. On December 19, Paul went to the Clearwater and St. Petersburg stores and repeated the process of informing the employees in the same manner. The Clearwater employees voted on December 19, and the St. Petersburg employees voted on December 20.

The election directed by the Board in this Supplemental Decision was never held. For, on July 17, 1958 (and thus after the Respondent's termination of Davis' employment), the Board granted a request by the Union to withdraw its representation petition in Case No. 12-RC-184.

#### *C. James C. Davis*

##### 1. Davis' employment by the Respondent, the calibre of his work, and his organizational activities

James E. Davis has worked as a butcher since 1937 and was continuously employed by the Respondent from March 1957 until he was laid off or discharged at the end of June 1958. He first worked for the Respondent as a fishman at its Clearwater store for a week and then, in the same capacity, at its newly opened St. Petersburg store for several weeks. From the beginning of June 1957 until his termination about a year later, he served as a butcher or meatcutter in the Respondent's stores at St. Petersburg and Clearwater under the general supervision of Supervisor George Paul (the Respondent's Florida district meat supervisor) and Assistant Supervisor John Roberts. At Paul's direction, Davis "ran" the budget meat department at the St. Petersburg store until the middle of August 1957. At his own request, he was then transferred back to the Clearwater store. Thereafter, with the exception of 3 weeks as vacation-relief butcher at the St. Petersburg store in May and the beginning of June 1958, he worked steadily at the Clearwater store as a butcher or meatcutter, principally on budget meats, until his termination on June 27, 1958.

From all the evidence in the case it consistently appears that Davis was—as Meat Manager Edward Mello of the Clearwater store put it—"a damn good employee." A butcher with 20 years' experience, he was capable of working independently, making all the cuts, and rendering the service required of him by the Respondent. He was never criticized for his work or his attitude by any of his supervisors. He received three wage increases and the promise of further increases. He was placed in charge of the budget meat department at the St. Petersburg store and left that position to go back to the Clearwater store where there was no comparable position of responsibility, only at his own request and at the same salary he had been receiving at the St. Petersburg store. In May 1958, he was temporarily transferred again to the St. Petersburg store to fill in during the vacation of the meat manager of the

store, taking the position of the assistant who temporarily acted as manager. Even as late as this, Superintendent Paul asked him if he would like to help to start the new store the Respondent was about to open, and did open in August, on Fourth Street in St. Petersburg. All of this is uncontradicted. Indeed, everything in the record indicates quite clearly that, up until the time Davis was laid off, the Respondent's supervisors, including Paul, had the highest regard for Davis as a butcher and were desirous of retaining his services, especially since, as Mello and Branch Manager Armstrong admitted, experienced meatcutters were not easily obtained.

Davis had been a member of the Union from 1939 to 1943. He again signed a union authorization card when Business Agent Mario Cabrera visited the St. Petersburg store and solicited membership applications from the employees in June 1957. Thereafter, Cabrera visited and spoke with Davis at both the St. Petersburg and Clearwater stores in connection with the Union's organizational campaign. In the period up to the end of 1958, Davis talked to many of the Respondent's employees in these stores, urging them to join and be represented by the Union. At a pre-election meeting held on December 10, 1957, by the Union and the Retail Clerks for both the meat and grocery employees and attended by several of the Respondent's supervisors, Davis attracted the attention of the union officials by his questions and was chosen as an election observer by the Retail Clerks' representative because, as the representative stated before all those who were present at the meeting, he "was more out-spoken than the rest of them."<sup>7</sup> Even after the inconclusive election in December, Davis continued his advocacy of the Union in such a manner as to come to the attention of the Respondent's supervisors. For, in January 1958, while working with Jack Whitten who was then meat manager of the Clearwater store, he told Whitten in the hearing of Supervisors Paul and Roberts that "we had better conditions under the union," whereupon Paul told them "they talked too much," although he later apologized and said "he didn't mean it." And, in June 1958, while Davis and Larry Burroughs (another Clearwater butcher) were working together on the same block with Edward Mello, who had by then become meat manager of the store, Burroughs complained of the manner in which Supervisor Paul criticized the work of the butchers and Davis told him, "If we had the union, they couldn't talk to a man as if he were nothing. If they voted the union out, we lost that right."

Davis was also one of the employees to whom Supervisor Paul talked about the Union, not only in December 1957 (as has already been found) but also at an earlier meeting to which he called the Clearwater employees in September 1957. At the September meeting, which Paul told the men was a "get-acquainted" meeting, Paul referred to the Union and the expected representation election, and said that the Respondent's president or vice president would come to speak to them about the Company's policies with respect to employees, that the employees should "not be too hasty" in signing the Union's cards as he had heard they were doing, and that "if he heard of anybody signing them or saw anybody signing them, he would fire them."

In connection with his interview by Supervisor Paul 2 or 3 days before the election in December 1957, Davis testified without contradiction, and the Trial Examiner finds, that, having been raised from his original weekly wage of \$55 to \$70 at the time he took charge of the budget meats at the St. Petersburg store in June 1957, he next received successive wage increases in December 1957, first to \$75 in the first week of that month, and then to \$85 for the last week of the month. Davis further testified without contradiction (and I also find) that Paul informed him of this last raise when he and the other employees in the Clearwater store were called in separately by Paul, 2 or 3 days before the representation election, and that on the occasion of announcing either of the last two raises, Paul told him that in 6 months there would be another \$5 raise; that in 2 years Davis would be making \$100 a week; that "they didn't want the union in there"; and that "it wouldn't be as good under the union as what it was without the union."

## 2. Termination of Davis' employment and reasons given by the Respondent

Davis' layoff on June 27, 1958, occurred against the relevant background of two immediately preceding developments. On the very day of the layoff, the Respondent's attorney and its west coast branch manager, Walter Armstrong, were notified over the telephone by Woodrow Strickland, attorney in the Board's Regional Office at

<sup>7</sup> This finding, as well as the other findings not otherwise noted, is based upon Davis' uncontradicted testimony. Davis never did serve as an election observer, however, because of a change in the manner in which the election was eventually conducted by the Regional Director.

Tampa, of the Board's Decision of June 26, in which the Board set aside the December representation election in Case No. 12-RC-184 and directed that a new election be held.<sup>8</sup> On the other hand, it also appears clear from both Davis' and Mello's evidence, and I accordingly find, that for several weeks there had been talk between Supervisor Paul and the Respondent's other supervisors, and by Clearwater Meat Manager Mello with his meat department employees, including Davis, of the possibility of the layoff of one man at the Clearwater store unless the men took their vacations early and, by the time the vacation season was over, the Respondent had opened an additional, new store on Fourth Street.

It appears that the Respondent's meat business at the Clearwater store did fall off after June 28.<sup>9</sup> Although this had not yet occurred at the time Davis was laid off, it seems to have been a reasonable expectation on the part of the Respondent. Under the circumstances, including the number of butchers then employed at the Clearwater store, I find not only that the Respondent in fact had for several weeks contemplated the layoff of one Clearwater butcher because of the expected decline in business, but that a layoff of one of the butchers would have been effected regardless of the Respondent's attitude toward the unionization of its employees, if not on June 27 then at least shortly thereafter. The questions remain, however, whether, were it not for his apparently known ardent support of the Union, Davis would have been the one selected for layoff and whether the layoff would have been effected, as it was, on June 27 rather than at a later date when the store's seasonal decline in the meat business actually began.<sup>10</sup>

Davis returned to work at the Clearwater store from his temporary assignment at the St. Petersburg store, on or about June 19, 1958. In addition to Meat Manager Mello and Davis, there were then four meatcutters assigned to the Clearwater store. One of them, Jack Whitten, who had been a butcher since 1919 and had previously been meat manager at the Clearwater store, had been off from work since June 10 because of trouble with his leg. According to Mello, Whitten started work again on Monday, June 30, but according to Whitten's testimony, which I credit, Whitten returned to work only in the second week in July. As to another of the Clearwater store's butchers at this time, the record shows only that his name was Al Petit. But as to the remaining two butchers, one—Larry Burroughs—had just been hired in the beginning of June 1958, and the other, Phil Pearson, a young man 20 years of age, with only 1½ years' experience as a butcher, had been hired by the Respondent in November 1957, and was expecting that he would soon be inducted in the Army.

Manager Mello notified Davis of his termination late on the afternoon of Friday, June 27. According to Mello, in telling Davis he was being laid off, he simply said that he had received orders that someone had to go in the meat department. According to Davis, Mello told him that Supervisor Paul had told Mello to let Davis go; that Davis was as good a man as he had; that Mello could not understand why Paul was letting Davis go but he had to follow orders; and that Mello thereupon paid him for Saturday although he was laid off on Friday. Davis also testified that Fish Supervisor Schrader came upon the men as they were talking and said that Supervisors Paul and Roberts had had a lengthy discussion in the office and that Paul just said he was letting Davis go.

Although from Mello's testimony it would appear that he had given Davis no reason or explanation for his selection of Davis for layoff, Mello nevertheless explained at the hearing that he himself had made the choice as between Davis and Phil Pearson. According to Mello, he had known for several weeks from Supervisor Paul that someone would probably have to be laid off and that Mello would be expected to make the selection. He testified that on the preceding Monday (June 23), Paul had definitely told him he should pick the man to be laid off; that neither Paul nor Supervisor Roberts had told him who it should be; that he

<sup>8</sup> Although Armstrong at first was not certain whether he had this telephone conversation on Friday, June 27, or Saturday, June 28, he later testified that it must have been on Friday. In his brief, counsel for the Respondent concedes the accuracy of the finding now made in the text.

<sup>9</sup> The Respondent's records showed the following net sales for the Clearwater store during the months of June and July 1958:

<i>Weeks ending</i>			
June 7.....	\$12, 103	July 5.....	\$10, 642
June 14.....	10, 459	July 12.....	9, 885
June 21.....	11, 505	July 19.....	9, 060
June 28.....	12, 018	July 26.....	7, 510

<sup>10</sup> See the preceding footnote.

(Mello) had considered laying off Pearson who expected to be inducted in the Army; that on Monday, June 23, Pearson said he was not being inducted; that, with the choice narrowed to Davis and Pearson, he chose Davis for layoff; that only after he made this decision did he discuss it with Supervisor Paul; that he then notified Supervisor Roberts; and that Roberts, upon then coming to the Clearwater store, told Mello to lay off Davis and that "it had to be that evening."

In a pretrial affidavit, Mello had stated, among other things, that he "had let James Davis go under order from higher authority"; that he "thought [Davis] was a damn good employee"; and that "Phil Pearson was considered at the same time to let him go instead of Jim . . . [because of Pearson's] having been called for induction physical into the Army." In his testimony, Mello reiterated his high regard for Davis as an experienced butcher but explained his decision to lay off Davis, rather than Pearson, on the ground that in his opinion Pearson was a better employee. According to Mello, Pearson was "young, ambitious as hell." On the other hand, Mello's only specific criticisms of Davis (which he says he considered in reaching his decision to lay off Davis) were that, according to information received by Mello from Paul before any layoff was discussed, there had been three customer-complaints about Davis' service at the window, and that Davis, although a good worker, did not seem to like to be told what to do.

Neither Supervisor Paul nor Supervisor Roberts testified. For comparison with Mello's statement of the reasons for Davis' layoff, it should be noted that during the investigatory stage of the present case, the Respondent's branch personnel manager furnished the Regional Director with several statements, the substance of which was to the effect that "Mr. Davis was selected [for economic layoff] because (1) his work was the least efficient, (2) previous customer complaints, and (3) because several weeks earlier he had been off without notice for 3 days. The meat manager of the Clearwater store will corroborate the fact that his performance was below standard."

By this statement, the Respondent has apparently sought to strengthen its position by going beyond the reasons given by Mello for Davis' layoff, although, according to Mello and the Respondent's general contention, it was Mello who made the choice of the butcher who was to be laid off. Indeed, the branch personnel manager's statement that Davis' "performance was below standard" is in square conflict with all the evidence at the hearing, including Mello's testimony. As to the personnel manager's statement concerning Davis' absence from work for several days without reporting, not only is it clear from Mello's testimony that this was *not* a factor in his deciding to lay off Davis rather than Pearson, but Davis' uncontradicted and credible version of what actually happened shows a disposition on the part of the Respondent to justify Davis' layoff on any pretext available, however flimsy or unreasonable it might be and even though it had obviously not occurred to the Respondent at the time that Davis was laid off.

Davis was in fact absent from work for 4 days while he was on his temporary assignment at the St. Petersburg store, i.e., Saturday, June 14, and Monday through Wednesday, June 16 through 18, 1958. On the preceding Tuesday, June 10, a cutting board came off while he was at work and cut his knee, a fact which he reported to the store manager as he was supposed to do. On Friday, he told the meat manager, Joe Nestro, that he was sick and was told to take care of his knee but to try to come to work. On Saturday afternoon, he showed his knee to Supervisor Roberts who instructed him to report to the office for referral to a doctor and the hospital. The office girl could not reach the doctor she called but gave Davis a referral card to a St. Petersburg hospital which, on his appearance, refused to admit him because it was not "an emergency." Returning to the Respondent's office, he was then, on his own suggestion, given a referral card to his own doctor. But his doctor was not in, and Davis then went to the Clearwater hospital where he received an inoculation, treatment to his knee, other medication, and advice that, since he had a temperature, he should remain in bed and see his own doctor on Monday. Following this advice, he went home to bed and saw his doctor and received treatments on Monday, Tuesday, and Wednesday. On both Monday and Tuesday he went back home to bed on his doctor's advice without getting in touch with the Respondent's store or office because, as he testified, he had "reported out" on Saturday and "they knew I was sick." On Wednesday afternoon, June 18, however, he went to the St. Petersburg store and told Meat Manager Nestro he would be back at work the next day. But Nestro told him to report back to the Clearwater store because Whitten was sick and not working. On Thursday, June 19, Davis returned to work at the Clearwater store. No one ever spoke to him about his being off these 3 or 4 days.

Finally, with respect to a comparison of the abilities of Davis and Pearson as meatcutters, according to the substance of the testimony of Davis, Whitten, and

Franklin Francis (a butcher since 1929, who worked briefly at the Clearwater store) and also the testimony of Mary Webber and Lucille Freeman, two of the women employees in the meat department at the Clearwater store, Davis was not only capable of handling any meatcutting assignment given him but also capable and willing in his service of customers, whereas Pearson, though willing and conscientious, was still learning and somewhat limited in his meatcutting ability.

### 3. Conclusions

In my opinion, the evidence amply proves that the Respondent laid off Davis on June 27, 1958, because Davis was known to it and its supervisors to be a strong, outspoken supporter of the Union and the Respondent had learned on the same day that the Board had directed that another representation election should be held. This conclusion is impelled by the following factors which I believe are clearly shown by the evidence:

(1) The Respondent had been intent upon preventing the unionization of its employees and, with this intent, had even threatened to discharge employees if they supported the Union.

(2) Davis had, to the knowledge of the Respondent, continued to be an openly persistent advocate of the Union as the bargaining representative of the Respondent's employees.

(3) Under the circumstances shown by the record, the explanation given by the Respondent for selecting Davis for layoff is not credible.

The first two of these three factors seem to me to be self-evident on the face of the findings I have already made. Although the Respondent's interference with the December election and Supervisor Paul's threats the preceding September may not themselves be found to be unfair labor practices in the present proceeding because of the time limitations prescribed by Section 10(b) of the Act, they certainly present competent and convincing evidence of the strong antagonism of the Respondent to the Union's organization and representation of its employees and the lengths to which the Respondent was prepared to go in order to prevent this from occurring. And, in view of the specific and detailed findings already made upon the uncontradicted evidence, there can also be no doubt that the Respondent knew, through its supervisors, of Davis' persistent adherence to, and advocacy of, the Union, both before and after the December election.

The final and conclusive indication that the Respondent in fact laid off Davis in order to rid itself of a troublesome union advocate before a second representation election could be held, is provided by the incredibility of the Respondent's explanation of why Davis was chosen for layoff. In the light of the rest of the record, the Respondent's attempt, through Mello's testimony and the statement of its personnel director, to deprecate Davis' ability and performance in comparison with that of Pearson, seems to me to be extremely weak and unconvincing. As has been pointed out, up to the very time of his layoff, Davis, as a veteran butcher with 20 years' experience, was regarded as "a damn good employee," whose superior ability and performance was clearly recognized by the Respondent, particularly by Supervisor Paul who obviously wanted to retain his services and offered him a job in the Respondent's new store on Fourth Street in St. Petersburg. And then, suddenly, though still "a damn good employee," Davis was inferior to Phil Pearson, a 20-year old butcher with only 1½ years' experience as a butcher. Then, too, three customer-complaints against Davis were remembered. And finally, upon Supervisor Roberts' instruction, Davis had to be laid off immediately, without working the last day of his regular workweek, even though the Clearwater store was short a butcher for another 2 weeks due to Whitten's continued absence from work because of his leg injury. The Respondent's reversal of its attitude toward Davis was much too startling, complete, and precipitate for its explanation of its innocence in selecting Davis for layoff to be credible. In my opinion, upon consideration of all the factors shown by the record, the explanation for the Respondent's selection of Davis for layoff, rather than Pearson or one of the other Clearwater butchers, is to be found not in the Respondent's judgment that Davis was the least efficient butcher at the store, but rather in the fact that the Respondent recognized him to be a staunch union adherent, who could be expected to work for the Union in the second representation election.

Upon all the evidence and the foregoing considerations, I find and conclude that the Respondent laid off James E. Davis on June 27, 1958, because of his adherence to, and his activities on behalf of, the Union, and that, in violation of Section 8(a)(3) and (1) of the Act, the Respondent thereby discriminated against him in regard to his hire and tenure of employment in order to discourage membership in the Union.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

## V. THE REMEDY

Since it has been found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, I will recommend that they cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

The Trial Examiner has found that the Respondent discriminatorily laid off James E. Davis and has since failed to reinstate him. I will recommend that the Respondent offer James E. Davis immediate and full reinstatement to his former or substantially equivalent position, and make him whole (in accordance with the formula set out in *F. W. Woolworth Company*, 90 NLRB 289) for any loss of pay which he may have suffered by reason of the Respondent's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from June 28, 1958, to the date of the Respondent's offer of reinstatement, less his net earnings during said period. It will also be recommended that the Respondent, upon reasonable request, make available to the Board and its agents all payroll and other records pertinent to an analysis of the amount due as backpay.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

## CONCLUSIONS OF LAW

1. Local Union No. 282, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of the Act.

2. By discriminating in regard to the hire and tenure of employment of James E. Davis, thereby discouraging membership in Local No. 282, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and interfering with, restraining, and coercing its employees in the exercise of their rights under Section 7 of the Act, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. 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.]

### Whaley Coal Company and Scott County Miners Union, Petitioner. Case No. 9-RC-3683.<sup>1</sup> October 1, 1959

## DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Clifford L. Hardy, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.<sup>2</sup>

<sup>1</sup> Case No. 9-RC-3683, which was consolidated with *Snyder & Randolph, Inc.*, 9-RC-3684, for the purposes of hearing, was severed for purposes of decision.

<sup>2</sup> The Intervenor, District 19, United Mine Workers of America, declined to stipulate that the Petitioner is a labor organization within the meaning of the Act. As the record