

In view of the age of the certificate, the numerous changes from the certificate's unit description made by the parties in the collective-bargaining contracts negotiated since the certification, and the exclusion of some or all of the individuals in dispute from some or all of these contracts, we find that the unit for which the Petitioner is bargaining representative is too indeterminate at this time to permit resolving by motion for clarification the question whether the disputed individuals belong in the unit.⁴ The Petitioner should file a new petition for certification of representatives to resolve this question. The Board will then decide in the light of present conditions what is the appropriate unit and whether any employees because of bargaining history should be permitted to vote separately before including them in the unit.⁵

ORDER

IT IS HEREBY ORDERED that the request of Office and Professional Workers Local 15, affiliated with Associated Unions of America, for clarification of certification be, and it hereby is, denied.

⁴ See *A O Smath Corporation, Kanlakee Works*, 119 NLRB 621, 622; *Lockheed Aircraft Corporation*, 89 NLRB 1, 2

⁵ See *The Zia Company*, 108 NLRB 1134

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO¹ and Peyton Packing Company, Inc. *Case No. 28-CC-66. May 3, 1961*

DECISION AND ORDER

On May 23, 1960, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices 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 Respondent and the General Counsel filed exceptions to the Intermediate Report and the General Counsel filed a brief in support thereof.

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, conclusions, and recommendations of the Trial Examiner to the extent consistent herewith.

¹ The complaint against Local 391, Amalgamated Meat Cutters and Butcher Workmen of North America, was dismissed by motion of the General Counsel at the hearing.

Peyton Packing Company, Inc., herein called Peyton, is involved in a labor dispute with Respondent Union, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, herein called the Union. During the period from December 21 through 24, 1959, the Union caused handbills to be distributed at various retail food markets in Albuquerque, New Mexico, of Safeway Stores, Inc., and Furr Food Stores, Inc., herein called Safeway and Furr. Both Safeway and Furr purchase meat products from Peyton. The handbills, not alleged in the complaint to contain any misrepresentation, constituted an appeal to the public not to buy meat products produced by Peyton, and specifically described Peyton products carried at the food markets.

On December 26, 1959, the meat merchandising manager of the El Paso Division of Safeway, which division includes the Albuquerque District, called Jessie Clark, an International representative of the Respondent, and asked what Safeway could do "to get the handbills off the stores." Clark replied, "All I can tell you is that I suggest you stop handling Peyton merchandise. All that it will take is a week and it will probably be over with."

On, or about, December 21, 1959, Clark told the manager of the meat market at the Furr store at 4808 Lomas Street in Albuquerque, "I wish you would help us out by slowing down on buying Peyton meat products."

The General Counsel contends that the above statements made by Union Representative Clark to the Safeway and Furr employees support the alleged violation of Section 8(b)(4)(i)(B). For the reasons hereafter indicated, we find this contention to be without adequate record support.

Section 8(b)(4)(i)(B) prohibits union inducement or encouragement of "any individual employed by any person" where such conduct is directed to the objectives there set forth. As indicated by the Trial Examiner, we are called upon to determine, first, whether either of the employees to whom the above statements were made by Clark is, in fact, such an "individual."

In the recently decided *Carolina Lumber Company*² case, we pointed out that in deciding such an issue "It will . . . be necessary in each case . . . to examine such factors as the organizational setup of the company; the authority, responsibility, and background of the supervisors, and their working conditions, duties, and functions on the job involved in this dispute; salary; earnings; perquisites; and benefits. No single factor will be determinative." Concerning the Safeway and Furr employees who were allegedly induced, the record contains no more than the naked stipulation of the parties that each is a "supervisor within the meaning of the Act and during the

² 130 NLRB 1438.

normal course of his employment purchases the meat supplies" for Safeway and Furr, respectively. There is no evidence to show "the organizational setup of the company, the authority, responsibility and background of these supervisors, their duties and functions on the job involved in this dispute, salary, earnings, perquisites, benefits" or any other factors which we might use to make the determination we deem basic to the disposition of the complaint in this case, namely, whether either of the supervisors herein is an "individual employed by any person" within the meaning of Section 8(b)(4)(i). We shall therefore dismiss the complaint.³

[The Board dismissed the complaint.]

CHAIRMAN McCULLOCH and MEMBER BROWN took no part in the consideration of the above Decision and Order.

³ In light of our disposition of the complaint, we neither decide nor pass upon the additional question of whether the conduct here complained of constitutes inducement within the meaning of 8(b)(4)(i)(B).

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This matter was tried before Trial Examiner Wallace E. Royster in Albuquerque, New Mexico, on March 18, 1960. Upon a charge filed by Peyton Packing Company, Inc., herein called Peyton, the General Counsel of the National Labor Relations Board issued his complaint alleging that Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO,¹ herein called the Respondent, had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b)(4)(i)(B) and Section 2(6) and (7) of the National Labor Relations Act, (61 Stat. 136) herein called the Act.

Upon the entire record in the case I make the following:

FINDINGS OF FACT²

I. THE BUSINESS OF THE COMPANIES

Peyton is a Texas corporation with a place of business in El Paso, Texas, where it is engaged in meatpacking and cattle feeding. During the 12-month period preceding the issuance of the complaint, Peyton shipped meat products valued in excess of \$50,000 from El Paso to points outside the State of Texas.

Safeway Stores Inc., herein called Safeway, and Furr Food Stores Inc., herein called Furr, each operate retail food markets in Albuquerque, New Mexico. During the 12-month period preceding the issuance of the complaint each did a gross volume of business in excess of \$500,000 and purchased products valued in excess of \$50,000 which were shipped to Safeway and to Furr from points outside the State of New Mexico.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent, a labor organization within the meaning of Section 2(5) of the Act, has for some time past been engaged in a primary labor dispute with Peyton.

From December 21 through 24, 1959,³ the Respondent caused handbills to be distributed at various Safeway markets in Albuquerque. The handbills constituted an appeal to customers not to buy meat products produced by Peyton. The complaint does not allege that the leaflets constitute any sort of misrepresentation. On

¹ The complaint as to Local Union 391 was dismissed at the hearing on motion of the General Counsel.

² The operative facts in this case were stipulated at the hearing.

³ All dates mentioned hereinafter are in 1959.

December 26, 1959, the meat merchandising manager of the El Paso division of Safeway, telephoned Jessie Clark, an international representative of the Respondent and asked what Safeway could do to bring an end to the leafleting. Clark replied, "All I can tell you is that I suggest you stop handling Peyton merchandise. All that it will take is a week and it will probably be over with." The representative of Safeway making this inquiry is a supervisor within the meaning of the Act and in the course of his employment purchases meat supplies for Safeway Stores in the Albuquerque area.

On December 21, 1959, Clark, in a conversation with the manager of Furr's meat market, said, "I wish you would help us out by slowing down on buying Peyton meat products." Furr's manager is a supervisor within the meaning of the Act and during the course of his employment purchases meat supplies for Furr.

The complaint alleges that in the two conversations set forth above the Respondent has violated Section 8(b)(4)(i)(B) of the Act. The section referred to reads in pertinent part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; . . . where . . . an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . ;

The General Counsel asserts that "any individual" as used in the Act includes the Safeway and Furr supervisors. Thus it follows that the words used by Clark constitute forbidden inducement and encouragement to the end that the representatives of Safeway and Furr cease doing business with Peyton.

Counsel for the Respondent contends that the description "any individual" in the Act is not intended to describe persons who are employed in a supervisory capacity. In this connection it is pointed out that a companion section of the Act forbids the use of threats, coercion or restraint against any person such as Safeway and Furr, to accomplish a cessation of business with Peyton but that the Respondent is free to use persuasion of Safeway and Furr to bring about that result.

The section of the Act set forth above appears in identical language in the bill known as S. 748 introduced by Senator Goldwater in late January, then sometimes referred to as the "administration bill." Counsel for the Respondent in his brief, sets forth testimony of Secretary of Labor Mitchell as to the meaning and intent of the provision here under study. On his appearance before a Senate subcommittee on February 4, Senator Kennedy asked the Secretary, "Would it be a violation of . . . your bill if the business agent of the Clothing Workers Union at company A spoke to the plant manager and requested him not to order materials—nonunion materials—from the racketeer plant in Pennsylvania?" Secretary Mitchell answered, "We don't think it would be, Senator." Senator Kennedy persisted, "Now supposing the plant in Pennsylvania was a nonunion plant, would it be a violation under your bill for union leaders in another company to go to his plant manager and ask him not to buy goods from the nonunion plant?" The Secretary replied, "Request him not to buy? No."

Following this appearance, Secretary Mitchell submitted answers to certain questions which had been raised in the course of his testimony in a letter to Senator Kennedy. In reference to the section of the Act of interest here, the Secretary wrote, "This is intended to reach secondary activity which is directed at a single employee and not primary activity. It is not intended to include any person acting as an agent of an employer, such as supervisory or managerial personnel." In the same communication the Secretary said, "a mere request of an employer or his agent would not be a violation of section [8(b)(4)(i)(B)] unless, under all the circumstances, it is found as a matter of fact that the request is accompanied by an express or implied threat of reprisal or force." Then speaking to a postulated case, the Secretary wrote "Although the superintendent is employed by the school board, it is assumed that he is a supervisor, in which case only the 'threat,' 'coercion,' and 'restraint' provision of the proposed section 8(b)(4)(ii), and not the 'inducement' or 'encouragement' provision of the proposed Section 8(b)(4)(i), is applicable to him, as it is the intent of the proposed bill that only section 8(b)(4)(ii), and not

section 8(b)(4)(i), is to apply to employers (in the generic sense) and to their agents, such as supervisors."

During the debate in the Senate on April 17, Senator Humphrey suggested that Section 8(b)(4)(i) posed a dilemma in that it appeared to forbid a labor organization to appeal to a supervisor to decline to accept a shipment from a struck employer. Senator Humphrey observed "to prohibit the union from approaching [supervisors] would be to cut off the union from its normal channels of communication. It would be a mockery to say that the union is free to persuade a neutral employer to assist it, but to deny the union access to the employer's supervisory and managerial staff." On April 21 following, Senator Goldwater, saying that he desired to allay some of the fears expressed by his colleagues, commented that 8(b)(4)(i) was intended to reach inducements directed at a single employee but made no mention of the supervisor problem.

On July 27, speaking of H.R. 8400 which contained the identical provision here for interpretation, Congressman Griffin commented that the law as it then existed did not provide a penalty against inducement and encouragement of farm laborers, railway workers, and supervisors to engage in secondary boycotts. The amendment as finally adopted would, Congressman Griffin said, correct this situation by changing "employees" to "any individual employed by any person." On August 11, speaking in support of the change in Section 8(b)(4), Congressman Rhodes said, "Since farm laborers, railway labor, and supervisors are not 'employees' within the meaning of the Act, unions may now without penalty induce them to engage in secondary boycotts. The Landrum-Griffin bill corrects this by changing the word 'employees' . . . to 'any individual employed by any person.'"

It is the obvious scheme of the Act, as recently amended, to permit a labor organization to seek by means of persuasion the cooperation of a secondary employer in aid of a primary labor dispute elsewhere while forbidding the use of threats, restraints, and coercion upon that employer to bring about the same result. It is also clear that a union may not use such persuasion directed to "any individual" in an employment relation with the secondary employer to induce or encourage "any individual" to strike or refuse to perform services in aid of a forbidden objective. As "any individual" excepting those who are sole proprietors or partners, is commonly employed by a "person," a literal reading of 8(b)(4)(i) would appear to forbid a union by means of persuasion even though short of threats, coercion, or restraint, to induce or encourage the president of a corporation to refuse to perform services for his corporate employer with an object of forcing or requiring the corporation to cease doing business with any other person. Such an interpretation of Section 8(b)(4)(i) would sharply limit the area in which (4)(ii) would find application. If a union may not ask the employee agent of a person whose business is in commerce to cease doing business with another person without violating the Act, then except as to sole proprietorships and partnerships, (4)(ii) is surplusage. Furthermore, a disparity would exist in that a union could use its arts of persuasion (always short of threats, coercion, or restraint) to the utmost when dealing with a proprietor or a partner but be forbidden to use the same devices if the "person" exists in corporate form. Considering Section 8(b)(4) in its entirety and the practice by labor organizations, which according to legislative history, led to its adoption, I am convinced that a literal reading of 8(b)(4)(i) in the situation of this case would not accomplish the legislative objective. I believe that the interpretations given by Secretary Mitchell, Senator Humphrey, Congressman Griffin and Congressman Rhodes are not truly inconsistent. Viewing the section as a whole, the varying constructions are reasonably to be explained in that they probably postulated different fact situations. Although not called upon here to decide, it seems not unlikely that a labor organization in an effort to persuade an employer to cease doing business with some other person might violate Section 8(b)(4)(i) if it was thus inducing or encouraging a managerial employee to refuse to perform services for his employer. The answer to this must be reached by considering whether the managerial individual is being induced or encouraged to do something against the interest of his employer rather than the contrary. Inducement or encouragement to bring about a strike of supervisory or management personnel is inimical to the secondary employer's interest and, given the forbidden objective, may well constitute a violation of Section 8(b)(4)(i), but that is not the factual setting of this controversy. Here the Respondent desired consumers as well as Safeway and Furr to cease doing business with Peyton. At Safeway a leafleting campaign was conducted of which no complaint is made. Safeway's meat merchandising manager asked how the leafleting could be brought to a halt and was told that if Safeway would stop buying Peyton merchandise there would be an end to it. I do not consider that this advice from Respondent's representative can reasonably be interpreted as any inducement directed to the meat merchandising manager to act in any fashion contrary to the best in-

terest of Safeway. I think it to be a sophism to argue, as one must to support the complaint, that the meat merchandising manager was thus induced and encouraged "to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services." Safeway, through the agency of its meat merchandising manager, or otherwise could have decided that its business would be more profitable if the leafleting was stopped and that therefore in the exercise of good business judgment, it would be best for it to cease dealing with Peyton. It does not follow, however, that Safeway was thus subjected to a compulsion deriving from any inducement or encouragement of its meat merchandising manager to engage in a strike or otherwise to refuse to perform services in connection with his employment. I consider it not reasonable to conclude that the Respondent was attempting in any fashion to deprive Safeway of any sort of services theretofore rendered to it by its meat merchandising manager. This "manager" or "supervisor," however he may be termed, rather than being induced to act against his employer, was attempting to discover an answer to the problem (presumably of reduced sales) brought about by the leaflet. I find that the Respondent has not violated the Act in respect to the meat merchandising manager or to Safeway.

Upon the same considerations the same conclusion is reached as to Furr. The sum of the evidence as to Furr, is that the manager was asked to aid the Respondent by lessening his purchases from Peyton. If the manager desired to help the Respondent and if his employer did not object, I suppose that he was free to do so. Depending upon the authority of the Furr manager in matters of policy, he might have decided to go along with the Respondent's request or to ignore it and at all times be acting only in the interest of his employer. There is nothing in the factual situation presented which suggests to me an inducement or encouragement of any sort offered to the Furr manager to strike or to refuse to perform any sort of services for his employer. I find therefore that no violation of the Act is presented in respect to Furr or its manager.

CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
2. Peyton, Safeway, and Furr are persons within the meaning of Section 2(1) and Section 8(b)(4) of the Act.
3. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) of the Act.

[Recommendations omitted from publication.]

Kipbea Baking Company, Inc.; H & L Baking Company, Inc.; and Edwin Seiferth, Helen Seiferth, and Lorraine Zah and Local 3, Bakery and Confectionery Workers International Union of America. *Case No. 2-CA-6947. May 3, 1961*

DECISION AND ORDER

On August 15, 1960, Trial Examiner Arthur E. Reyman issued his Intermediate Report in this case, 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 and the Charging Party filed exceptions to the Intermediate Report and the Respondent and General Counsel filed briefs.

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