

against whom the plan would be initiated. The instant conduct of Respondents was illustrative of conduct planned against other Minneapolis stores. Our recommendation for a broad order is therefore appropriate to the circumstances.

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

CONCLUSIONS OF LAW

1. Minneapolis House Furnishing Company and Allied Central Stores, Inc., of Missouri d/b/a L. S. Donaldson Company are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Upholsterers Frame & Bedding Workers Twin City Local No. 61, affiliated with Upholsterers International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing Minneapolis House Furnishing Company and L. S. Donaldson Company on November 30 and December 1, 1959, respectively, and by publicizing plans to picket on November 26, 1959, Respondent induced and encouraged individuals employed by Minneapolis House Furnishing Company and L. S. Donaldson Company and more specifically supervisors, other than corporate officers, employed by said companies who determined or effectively influenced the purchasing policies of said companies with respect to furniture and bedding, to refuse in the course of their employment to use, process, transport, or otherwise handle or work on any furniture and bedding products of manufacturers located outside the Minneapolis-St. Paul area, or to perform any services in connection with such products with an object of forcing or requiring Minneapolis House Furnishing Company, L. S. Donaldson Company, or any other Minneapolis retail store to enter into an agreement prohibited by Section 8(e) of the Act; with a further object of forcing or requiring Minneapolis House Furnishing Company, L. S. Donaldson Company, and other Minneapolis retail stores to cease using, selling, handling, transporting, or otherwise dealing in the furniture and bedding products of manufacturers located outside the Minneapolis-St. Paul area, or to cease doing business with such manufacturers. Respondent by the foregoing conduct engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(A) and (B) of the Act.

4. By picketing Minneapolis House Furnishing Company, L. S. Donaldson Company on November 30 and December 1, 1959, respectively, and by publicizing plans to picket on November 26, 1959, Respondent threatened, coerced, and restrained Minneapolis House Furnishing Company and L. S. Donaldson Company and their agents with an object of forcing or requiring Minneapolis House Furnishing Company, L. S. Donaldson Company, and other Minneapolis retail stores to enter into an agreement prohibited by Section 8(e) of the Act; with a further object of forcing or requiring Minneapolis House Furnishing Company, L. S. Donaldson Company, and other Minneapolis retail stores to cease using, selling, handling, transporting, or otherwise dealing in the furniture and bedding products of manufacturers located outside the Minneapolis-St. Paul area, or to cease doing business with such manufacturers. Respondent by the foregoing conduct engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(A) and (B) of the Act.

5. By leaflets distributed on November 30 and December 1, 1959, Respondent did not engage in unfair labor practices within the meaning of Section 8(b)(4)(ii)(A) or (B) of the Act.

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

[Recommendations omitted from publication.]

Local 20, Sheet Metal Workers International Association, AFL-CIO and Bergen Drug Company, Inc. Case No. 22-CC-94.
July 11, 1961

DECISION AND ORDER

On November 8, 1960, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding, recommend-

ing that the complaint be dismissed in its entirety, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel and the Respondent filed exceptions to the Intermediate Report and briefs in support thereof.

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

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 briefs, and the entire record in the case, and finds merit in the exceptions filed by the General Counsel. Accordingly, the Board hereby adopts the findings of the Trial Examiner only to the extent consistent with the following:

Bergen Drug Company, the Charging Party, entered into a contract with Hull Construction Company, a general contractor, for the construction of a warehouse at South Brunswick, New Jersey. Except for minor work, the building was virtually completed by July 26, 1960. Bergen also contracted with Robert P. Rudy Co. for the purchase and installation of metal shelving for the warehouse. Rudy in turn subcontracted the installation of the shelving to Eastern Locker Repair Company.

A letter from Rudy to Bergen, dated June 22, 1960, set forth the following in connection with the installation agreement:

I have also made arrangements for *nonunion* labor to start installation of this shelving on July 5th We would appreciate your confirmation of this order for the *nonunion* labor. [Emphasis supplied.]

Bergen subsequently agreed to the employment of nonunion labor on June 24, when it confirmed its order to Rudy in accordance with the letter.

Between July 19 and July 26, 1960, three nonunion employees of Eastern Locker Repair were engaged in the installation of the shelving at Bergen's warehouse. On July 26, Milton Hull, a partner in Hull Construction Company discovered Mr. Ryan, Respondent's business agent, at the warehouse. Ryan told Hull that he had found nonunion men installing shelving at the warehouse and planned to picket the job on July 27.

At about 7:45 a.m. on July 27, two pickets appeared at the two driveway entrances to the warehouse, carrying signs with the following inscription:

SHEET METAL
WORKERS
ARE NOT PROTECTED
BY UNION WAGES
AND CONDITIONS
L.U. 20, S.M.W.L.U.

The picketing continued on July 28, 29, and August 1. On each day picketing occurred between the hours of 7:45 a.m. and 3:30 p.m.

At the time the picketing began, Edward S. Cardinali, Bergen's warehouse superintendent, was in the building. In addition, it is undisputed that an electrician, a carpenter, and a tileman, all employees of Hull subcontractors,¹ saw the picketing soon after reporting to work in the warehouse at about 8 a.m., on July 27, and left the warehouse premises. At about 8:30 a.m. on the first morning of the picketing, three employees of Eastern Locker noticed the picket line while approaching the warehouse and did not cross it. Thereafter no employee of Eastern returned to the plant. The installation of shelving was completed by Bergen's employees. Roy B. Dey, an employee of New Jersey Bell Telephone Company, came to the warehouse on either July 27 or 28 to install a telephone. As he approached the plant he noticed a picket. Dey asked the picket if it was "all right to cross." The picket replied, "I'd rather you didn't." Dey turned away and proceeded to his next order. According to Cardinali's uncontradicted testimony two electricians of Allan Electric Company drove to the warehouse at about 8 a.m. on July 27, spoke to a picket and did not enter the warehouse.

The complaint alleged that Respondent had violated Section 8(b) (4) (i) (B) of the Act by inducing individuals employed by secondary persons engaged in commerce or in industries affecting commerce to refuse to perform services for their employers, for proscribed objectives, and Section 8(b) (4) (ii) (B) by threatening, coercing, and restraining secondary persons for proscribed objectives.²

¹ Allan Electric Company, Wood-Art, Inc., and Harry Rich Floor, Inc.

² Section 8(b) provides:

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; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case 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, or forcing or requiring any other employer to recognize or bargain with a labor organization

The Trial Examiner recommended dismissal on two grounds: (1) that the record lacks evidence that any of the alleged secondary employers were persons engaged in commerce; and (2) that the Charging Party and Rudy had agreed to employ nonunion labor in the installation of the shelving. On the first point, the Trial Examiner stated that the "only evidence as to commerce in the record relates to Bergen, the Charging Party, and to Hull, the general contractor." He also declared that present Board policy obliged him to apply current jurisdictional standards in determining whether or not a secondary employer is "engaged in commerce" for purposes of finding violations under Section 8(b)(4)(i) and (ii)(B) of the Act. On the second point, the Trial Examiner asserted that "it would offend and negate public interest and the purposes of the Act to issue a remedial order perpetuating Bergen's unlawful policy. . . ."

The Trial Examiner's interpretation of Section 8(b)(4) fails to give full scope to its language. That section requires that a secondary employer be "engaged in commerce" or in "an industry affecting commerce." Thus, the fact that the secondary employer is not itself "engaged in commerce" is immaterial if it is in fact engaged "in an industry affecting commerce." The Trial Examiner considered relevant only the first of these terms, "engaged in commerce." In this he was in error. Hull's subcontractors, the employers of the employees who were induced not to cross the picket line, and Robert P. Rudy Co., are all engaged in the building and construction industry. This is an "industry affecting commerce" within the meaning of the statute.³ We also take judicial notice of the fact that New Jersey Bell Telephone Company is engaged in the communications industry which is an "industry affecting commerce." Accordingly, we find contrary to the Trial Examiner, that the secondary employers are "person[s] engaged in commerce or in an industry affecting commerce" within the meaning of Section 8(b)(4). We shall therefore consider the details of Respondent's alleged unlawful conduct.

As stated, Respondent discovered that Eastern Locker Repair Company was employing nonunion men to install metal shelving at Bergen's warehouse. It appears from the record that the Respondent wanted its members to install the shelving. We therefore find, contrary to the Trial Examiner, that Respondent's dispute was with the nonunion subcontractor, Eastern Locker Repair Company, and that Bergen was a secondary employer. We also find that Hull and its

as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . [Emphasis supplied.]

³ *S. M. Kiser, et al., d/b/a S. M. Kiser and Sons*, 131 NLRB 1196.

subcontractors, Rudy and New Jersey Bell Telephone, were secondary employers.

As secondary and primary employers were doing business at Bergen's warehouse, the Respondent was engaged in common situs picketing. Hence, our *Moore Dry Dock* criteria⁴ become relevant. Although these criteria require, *inter alia*, that the picketing must clearly disclose that the dispute is only with the primary employer, at no time during the picketing did the signs identify Eastern as the employer against whom the picketing was aimed. In addition, it is clear that employees of three of Hull's subcontractors left the warehouse as soon as they became aware of the picketing, that Dey, an employee of New Jersey Bell Telephone, was induced not to cross the picket line, and that two employees of Allan Electric Company came to the warehouse, spoke to a picket, and left.

In view of the foregoing, we find that Respondent induced and encouraged individuals employed by persons engaged in commerce or in an industry affecting commerce to cease doing work for their respective employers with an object of forcing Bergen or Rudy to cease doing business with Eastern, thereby violating Section 8(b) (4) (i) (B) of the Act.⁵ We also find that such conduct violated Section 8(b) (4) (ii) (B).⁶

For the reasons set forth in our recent decision in *Jerry Bady, d/b/a Bomat Plumbing and Heating*,⁷ we do not agree that the Bergen-Rudy agreement to utilize nonunion labor justified or excused Respondent's unlawful conduct.

THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth 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 of commerce.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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

⁴ *Moore Dry Dock Company*, 92 NLRB 547.

⁵ *Jerry Bady, d/b/a Bomat Plumbing and Heating*, 131 NLRB 1243; *S. M. Kisner, et al., d/b/a S. M. Kisner and Sons, supra*; *James D. O'Dell, et al., d/b/a Ada Transit Mix*, 130 NLRB 788; *Gilmore Construction Company*, 127 NLRB 541.

⁶ *James D. O'Dell, et al., d/b/a Ada Transit Mix, supra*; *Gilmore Construction Company, supra*.

⁷ *Supra*.

CONCLUSIONS OF LAW

1. Bergen Drug Company, Inc., and Hull Construction Company are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 20, Sheet Metal Workers International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in, or inducing or encouraging individuals employed by persons engaged in commerce or in an industry affecting commerce at the South Brunswick, New Jersey, warehouse of Bergen Drug Company, Inc., to engage in, a strike or a refusal in the course of their employment to perform services, and by threatening, coercing, or restraining persons engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring Bergen Drug Company, Inc., or Robert P. Rudy Co., to cease doing business with Eastern Locker Repair Company, Respondent has violated Section 8(b)(4)(i) and (ii)(B) 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.

ORDER

Upon the entire record in the case and pursuant to Section 10(c) of the Act, as amended, the National Labor Relations Board hereby orders that Local 20, Sheet Metal Workers International Association, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from engaging in or inducing or encouraging any individual employed by persons engaged in commerce or in an industry affecting commerce at the South Brunswick, New Jersey, warehouse of Bergen Drug Company, Inc., other than Eastern Locker Repair Company, 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, or, by picketing at the South Brunswick, New Jersey, warehouse of Bergen Drug Company, Inc., to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, other than Eastern Locker Repair Company, where in either case an object thereof is to force or require Bergen Drug Company, Inc., or Robert P. Rudy Co., to cease doing business with Eastern Locker Repair Company.

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

(a) Post in conspicuous places in Respondent's business offices, meeting halls, and places where notices to members are customarily posted, copies of the notice attached hereto marked "Appendix A."⁸ Copies of said notice, to be furnished by the Regional Director for the Twenty-second Region, shall, after being duly signed by an official representative of Respondent, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for the Twenty-second Region signed copies of the aforementioned notice for posting by Bergen Drug Company, Inc., at its South Brunswick, New Jersey, warehouse, if the Company is willing, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, shall, after being signed by Respondent, as indicated, be forthwith returned to the Regional Director for disposition by him.

(c) Notify the Regional Director for the Twenty-second Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

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."

APPENDIX

NOTICE TO ALL OUR MEMBERS AND TO ALL EMPLOYEES OF BERGEN DRUG COMPANY, INC.

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 give notice that:

WE WILL NOT induce or encourage any individual employed by persons engaged in commerce or in an industry affecting commerce at the South Brunswick, New Jersey, warehouse of Bergen Drug Company, Inc., other than Eastern Locker Repair Company, 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, or, by picketing at the South Brunswick, New Jersey, warehouse of Bergen Drug Company, Inc., to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, other than Eastern Locker Repair Company, where in either case an object thereof is to force or require Bergen Drug Company, Inc., or Robert P. Rudy

Company to cease doing business with Eastern Locker Repair Company.

LOCAL 20, SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION,
AFL-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.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Charges having been filed and duly served, a complaint, amended complaint, and notice of hearing thereon having been issued and served by the General Counsel of the National Labor Relations Board, and an answer having been filed by the above-named Respondent Union, a hearing involving allegations of unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, was held in Newark, New Jersey, on September 27, 1960, before the duly designated Trial Examiner.

At the hearing all parties were represented by counsel, and were afforded full opportunity to present evidence pertinent to the issues, to argue orally, and to file briefs. Briefs have been received from General Counsel and the Respondent.

Upon the record thus made, and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE CHARGING PARTY

Bergen Drug Company is a New Jersey corporation, with principal office and place of business in Hackensack, New Jersey, where it is engaged in the sale and distribution of pharmaceuticals and related products to drugstores and hospitals.

During the year preceding issuance of the complaint Bergen purchased, transferred, and delivered directly to its place of business pharmaceuticals and other goods and materials valued at more than \$4,000,000 from points outside the State of New Jersey. During the same period Bergen sold and shipped directly to customers outside the State of New Jersey goods valued at more than \$800,000.

The Charging Party is engaged in commerce within the meaning of the Act.

On December 30, 1959, Bergen entered into a contract with Hull Construction Company, a general contractor, for the construction of a warehouse in South Brunswick, New Jersey. The contract price for materials and services was \$450,000. Except for minor details, Hull completed construction under the contract in June 1960, and the key was formally turned over to Bergen on June 21, 1960.

On the basis of Board standards set out in *Jonesboro Grain*,¹ and because Hull provided Bergen, found above to be engaged in commerce, with goods and services valued at more than \$200,000, it is concluded and found that at least during the period of this warehouse construction Hull was engaged in commerce within the meaning of the Act.²

¹ *Jonesboro Grain Drying Cooperative*, 110 NLRB 481, 484.

² As will be noted more fully below, in the complaint, General Counsel alleged that numerous other employers, including some claimed to have been subcontractors under Hull, are "employers engaged in commerce or in industries affecting commerce." No factual evidence was introduced, however, except as to Bergen and Hull. Since the Respondent's answer denied such allegations, the issue was created and the burden was upon General Counsel to prove his claims. There being no proof in the record, there is no evidence before the Trial Examiner upon which to base commerce findings as to any other employer except Bergen and Hull.

II. THE RESPONDENT UNION

Local 20, Sheet Metal Workers International Association, AFL-CIO, is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Setting and issues*

In performance of the above-described contract with Bergen, Hull subcontracted a good part of the construction work. The identity of these subcontractors is immaterial to the issues since, as pointed out in a footnote below, the record is barren of evidence to support General Counsel's claim that such employers are "engaged in commerce or in industries affecting commerce."

According to the testimony of Milton Hull, a partner in Hull Construction Company, he "turned the key" over to Bergen on June 21, 1960, and it appears from his account that by July 26, 1960, his performance on this job had been finished except for such minor matters as radiator covers missing or damaged in shipment. In any event, none of Hull's employees were working on this job on July 27 or any material date thereafter because, he said "there was no work to be done" by them.

In addition to the general construction contract with Hull, Bergen also contracted with a New York "equipment-engineering-service" called Robert E. Rudy Co.; according to its letterhead in evidence, for the purchase and installation of certain metal shelving in the warehouse. This contract was in the form of Bergen's purchase order of June 24, which incorporated by reference a letter dated June 22, 1960, from Rudy to Bergen, which states:

I am very pleased to advise that your order for shelving has been entered with our factory and they will make shipment so that the shelving will arrive on Tuesday, July 5th, at your new warehouse in South Brunswick, N.J.

I have also made arrangements for *nonunion labor* to start installation of this shelving on July 5th. The price for this installation is \$1,510.00.

We would appreciate your confirmation of this order for the *nonunion labor*. [Emphasis supplied.]

It appears that Rudy, in turn, subcontracted the actual installation of the shelving to a concern called Eastern Locker Repair Company. According to the testimony of John H. Kenney, brother of the head of Eastern Locker, he and two other men, all nonunion, worked at the installation of shelving in the Bergen warehouse from about July 19 through July 26, 1960, without interruption.

On July 26 Milton Hull, on an inspection tour through the warehouse, observed near a rear door two individuals whom he did not know. He asked what they were doing there. One replied that he was Business Agent Ryan of the Sheet Metal Workers Union. In response to further inquiry Ryan told him that he had discovered nonunion men working on the shelving and planned to picket the job the next day. The next day Hull urged Ryan, by telephone, to get together with Bergen and settle the dispute. Ryan readily agreed. Arrangements were then made for Ryan to meet with a Bergen official, but according to Hull's uncontradicted testimony this official canceled the scheduled meeting. This same official, the same day, filed the original charge with a Board agent.

There is competent evidence that on the morning of July 27 pickets appeared at the two driveway entrances to the warehouse premises, carrying signs bearing the legend:

SHEET METAL
WORKERS
ON THIS JOB
ARE NOT PROTECTED
BY UNION WAGES
AND CONDITIONS
L.U 20, S.M.W.L.U.

It appears that pickets carrying similar signs were present also on July 28, 29, and August 1. There were no pickets at the site on Saturday and Sunday, July 30 and 31.

Upon discovering pickets at the premises on July 27, the following individuals failed to perform work at the warehouse under circumstances briefly described:

(1) John Kenney, acting upon instructions received the night before from his brother, head of Eastern Locker, and two other Eastern employees declined to cross the picket line that day (July 27) and did not return to complete installation of the shelving. According to Kenney, no picket spoke to him and he did not read the sign. He was informed upon approaching the plant by the Bergen superintendent that it was a union picket line, and having previously received instructions from his brother to do so, turned around and left.

(2) Frank Holzworth, a carpenter employed by one of the subcontractors, had about a half day's work to complete on the morning of July 27. He had not started work when he saw pickets drive up. "Not feeling so hot," he testified, he packed up and left.

(3) Either on July 27 or 28, according to R. B. Dey, an installer for the New Jersey Bell Telephone Company, he drove up to the premises, upon order (from the Telephone Company, apparently) to install a coin telephone at the warehouse. Approaching the premises he saw a picket and asked him if it "was all right to cross." The picket replied, "I'd rather you didn't," so he proceeded on to his next order.

The foregoing facts were developed by General Counsel, and the Respondent offered no evidence to rebut them.

Upon such facts General Counsel contends that it must be found that the Respondent Union violated the Act in these respects: (1) by picketing, etc., "induced and encouraged individuals employed by Hull" and numerous other "employers engaged in commerce or in industries affecting commerce" not to perform work for their respective employers; and (2) "threatened, coerced and restrained" Hull, Bergen, and various "other persons engaged in commerce or in an industry affecting commerce."

B. Conclusions

The sections of the Act, as amended, invoked by General Counsel, read as follows:

8. (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 or (ii) to threaten, coerce, or restrain *any person engaged in commerce or in an industry affecting commerce*. . . . [Emphasis supplied.]

Early in the hearing General Counsel advanced the theory that "Eastern Locker Repair and Maintenance Company" is the "primary employer herein," and that "picketing was in violation of the precepts laid down in *Moore Dry Dock*" (92 NLRB 549). He maintains this position in his brief, but does not explain precisely how he figures this to be so. Clearly Hull, the general contractor, considered the dispute to be between Bergen, who was alone responsible for the hiring of nonunion labor, and the Respondent, and the Trial Examiner discerns no other reasonable conclusion. In any event, for reasons set out below, it appears unnecessary to reach determination of the point.

Certain basic facts must be established before any theory may reasonably be applied. This the very language of the Act requires, as well as the obligations of due process.

Reverting to the italicized portions of Section 8(b)(4)(i) and (ii), quoted above, it seems rudimentary that in order to reach any conclusion of violation the Trial Examiner must find, as facts, that (1) some "individual" employed by "any person engaged in commerce or in an industry affecting commerce" has been induced or encouraged to stop or refuse to work, or (2) that some "person engaged in commerce or in an industry affecting commerce" has been threatened, coerced, or restrained. And facts, to be found, require evidence to support them.³

³ Unless and until the Board announces, as agency policy, that it requires no evidence, or standard, to find a secondary employer "engaged in commerce," the Trial Examiner assumed that he should continue to apply commerce standards currently observed to determine Board jurisdiction. The Trial Examiner notes that in each of the only two cases coming to his attention where the Board itself has issued decisions involving the same sections of the Act *Gilmore Construction Company* (127 NLRB 541) and *Republic Wire*

As noted above, the *only* evidence as to commerce in the record relates to Bergen, the Charging Party, and to Hull, the general contractor. Neither Bergen nor Hull had any employees at the warehouse at the time pickets were there, and it follows that none of them was "induced" to do or not to do anything. Hull's testimony makes it clear that he was neither threatened nor coerced in any fashion. And Bergen officials refused even to meet with a union representative.

Even assuming that the incidents noted above of employees of other employers declining to cross the picket line are of sufficient merit to warrant a finding that they were "induced" not to work by the mere presence of pickets, in the lack of any evidence in the record that such employees were "employed by any person engaged in commerce" no conclusion of violation may properly be drawn *in terms of the Act*.

Furthermore, and in the opinion of the Trial Examiner, an even more potent reason for recommending dismissal of the complaint is the documented fact that Bergen, the Charging Party, is responsible for its unlawful contract with Rudy, *requiring* the hiring of nonunion labor to install the metal shelving.

There can hardly be any question but that the Charging Party had knowledge of its own act. Robert Martini, division manager for Bergen, not only signed the original charge filed with the Board, but also the order to Rudy for the use of non-union labor. The documents in evidence show both that his order incorporated by reference Rudy's letter of June 22, quoted above, in which Rudy specifically requested confirmation of "this order for the nonunion labor," and that Martini graphically confirmed the order by circling the reference to nonunion labor in Rudy's letter and writing "OK-R. Martini 6/24/60" upon that letter which was returned to Rudy.

In a recent Intermediate Report (*Jerry Bady, d/b/a Bomat Plumbing and Heating, 131 NLRB 1243*), Trial Examiner Charles W. Schneider had occasion to appraise and pass upon a similar situation: where the charging employer, party to a similarly unlawful hiring contract, sought relief from picketing. At one point Trial Examiner Schneider said:

In my opinion to find a violation of the Act in the Respondent's conduct here, and to issue the requested remedial order, would be to perpetuate a condition of affairs itself in derogation of law, would be contrary to the public interest, and is consequently to be avoided.

The Trial Examiner agrees with and adopts the quoted reasoning in full.

In the same report Trial Examiner Schneider cited *Vaughn Bowen, et al.*, 93 NLRB 1147, as authority for recommending dismissal on the ground of abuse of the Board's process. The relevant quotation from that Board decision (p. 1153):

. . . We are satisfied that the Board's process has not been invoked to secure a remedy for violations of the Act, but for the sole purpose of getting the Board to assist the Teamsters in its scheme, which had, as its ultimate objective, forcing upon the Respondent Companies the employment of Teamsters members.

This attempt to use the Board's processes to further the cause of the Teamsters in its jurisdictional conflict with the Respondent Union constitutes, in our opinion, a palpable abuse of the Board's machinery. The Board may, of course, refuse to allow such advantage to be taken of it. In the words of the Supreme Court, "It is not required by the statute to move on every charge; it is merely enabled to do so. It may decline to be imposed upon or to submit its processes to abuse." [*N.L.R.B. v. Indiana & Michigan Electric Company et al*, 318 U.S. 9.] Under these circumstances we believe that it would serve the public interest to dismiss the allegations of the complaint. . . .

In concluding summary, the Trial Examiner will recommend that the complaint be dismissed in its entirety for the following reasons: (1) the record lacks factual evidence for a finding that any individual employed by any person engaged in commerce was induced to stop or refuse to work, or that any person engaged in commerce was threatened, coerced, or restrained by the Respondent or its agents; (2) it would offend and negate public interest and the purposes of the Act to issue a remedial order perpetuating Bergen's unlawful hiring policy; and (3) the Board should not countenance so obvious an abuse of its processes.

[Recommendations omitted from publication.]

Corporation (129 NLRB 376) the Board specifically found that certain secondary employers were engaged in commerce on the basis of the value of goods moving in commerce and according to current standards.