

**Edward P. Tepper, d/b/a Shoenberg Farms and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees' Local Union No. 537.** *Case No. 27-CA-922. August 29, 1961*

### DECISION AND ORDER

Upon unfair labor practice charges duly filed on February 1, 1961, by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees' Local Union No. 537 (herein called the Union), the General Counsel of the National Labor Relations Board, by the Regional Director for the Twenty-seventh Region, issued a complaint dated March 6, 1961, against Edward P. Tepper, d/b/a Shoenberg Farms (herein called the Respondent), alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleges, in substance, that the Union was and is the exclusive bargaining representative of all production and maintenance employees of the Respondent in an appropriate unit, and that on or about February 2, 1961, and at all times thereafter, Respondent unlawfully refused to bargain collectively with the Union.

Respondent's answer incorporating his motion to dismiss for lack of jurisdiction, filed March 14, 1961, admits certain factual allegations of the complaint, but denies the commission of unfair labor practices.

On March 17, 1961, all parties to this proceeding entered into a stipulation of facts and jointly requested the transfer of this proceeding directly to the Board for findings of fact, conclusions of law, and decision and order. The stipulation states that the parties have waived their rights to a hearing before a Trial Examiner, and to the issuance of an Intermediate Report. The parties agreed that the formal papers, including the stipulation, constitute the entire record in this proceeding.

On March 28, 1961, the Board approved the stipulation and transferred the case to the Board. A brief was thereafter received from the General Counsel only.

Upon the basis of the parties' stipulation of facts, the brief, and the entire record in the case, the Board makes the following:

132 NLRB No. 121.

## FINDINGS OF FACT

## I. THE BUSINESS OF THE RESPONDENT

The Respondent, a sole proprietorship, is engaged in the operation of a dairy farm and in the processing and wholesale distribution of eggs, milk, and dairy products at Arvada, Colorado. Respondent's dairy herd yields about 300 gallons of milk a day. In addition, Respondent purchases approximately 3,000 gallons of milk a day from other producers within the State of Colorado. The milk is then pasteurized, bottled, and delivered by Respondent to U.S. Government installations, schools, hospitals, hotels, and restaurants. During the year preceding the issuance of the complaint, Respondent purchased eggs and other products valued in excess of \$50,000 from producers outside the State for shipment directly into the State of Colorado and resale by the Respondent. Respondent's annual gross sales exceed \$1,000,000, of which approximately 30 percent are made to U.S. Army and other Government installations.

Contrary to the Respondent's contention, we find that he 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

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees' Local Union No. 537, is a labor organization as defined in Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

The facts as stipulated show that following a hearing upon a representation petition filed by the Union, the Board, on May 31, 1960, issued a Decision and Direction of Election<sup>2</sup> in which it found that the following employees constitute an appropriate unit:

All full- and part-time production and maintenance employees at the Employer's Arvada, Colorado, processing and marketing operations, including employees engaged in the production or actual handling of dairy products, route salesmen, special drivers, truckdrivers, and helpers, but excluding the Employer's wife and children, agricultural laborers, office and clerical employees, technical employees, guards, professional employees, foremen, the laboratory and milk plant supervisor, and all other supervisors as defined in the Act.

Pursuant to the above Decision and Direction of Election, an election was held on June 27, 1960. A majority of the employees in

<sup>1</sup> The Board asserted jurisdiction over the Respondent in *Edward P. Tepper, d/b/a Shoenberg Farms*, 129 NLRB 966.

<sup>2</sup> Case No. 30-RC-1830 (not published in NLRB volumes).

the unit voted in favor of being represented by the Union. On January 18, 1961, the Regional Director for the Twenty-seventh Region certified the Union as the exclusive bargaining representative of the employees in the aforesaid unit.

On January 23, and again on February 2, 1961, the Union requested the Respondent to begin negotiations for a collective-bargaining agreement covering employees in the appropriate unit. The Respondent, in a letter dated January 25, 1961, refused, stating that he was under no obligation to bargain because the ". . . National Labor Relations Board has no jurisdiction over my operation. . . . I am conducting a farm and dairy operation specifically excluded from the jurisdiction of the National Labor Relations Board." Respondent did not reply to the Union's letter dated February 2, 1961.

In his answer and motion to dismiss, Respondent renews the contention made at the representation hearing that his processing and marketing operations are integrated with his farming pursuits and that workers engaged in the former are therefore excluded from coverage of the Act as agricultural laborers.

Respondent owns and operates a farm of approximately 650 acres about 12 miles from Denver, Colorado. On this farm he maintains a herd of 200 to 300 cows. He also raises grain used as feed for the dairy herd. From the cows on his farm, Respondent obtains 300 to 315 gallons of milk daily. He also purchases approximately 3,000 gallons of raw milk every day from other milk producers. All this milk, produced and purchased, is pasteurized, bottled, and refrigerated in a plant located on Respondent's farm. Respondent sells and delivers this milk by trucks to hotels, restaurants, hospitals, U.S. Army installations, United Airlines, National Biscuit Company, and to some retail dairies. None of the milk is sold at retail.

In addition to processing milk, Respondent purchases and candles eggs. The eggs are purchased in the State of Utah and are transported to Respondent's milk bottling plant where they are candled and crated in the basement of the bottling plant by Respondent's employees. The eggs, like the milk, are sold to hotels, restaurants, hospitals, and U.S. Army installations.

About 10 employees work at processing, packaging, or delivering milk and egg products. Three of these also spend some time working on the farm, particularly during the summer. In addition there are five individuals who work entirely on the farm, tending cows, raising feed, and otherwise occupying themselves with farm chores.

In the representation decision the Board found that workers engaged in processing and marketing operations were not agricultural laborers, that the workers who were engaged entirely in farm duties were agricultural laborers, and that individuals who did both farm and nonfarm work were not agricultural laborers to the extent that they

performed nonfarm work. Accordingly, the Board included in the appropriate unit only those employees who spent all their time in processing and delivery operations and those individuals who did farm and nonfarm work, but only to the extent that they were engaged in nonfarm labor.

The Act excludes from its coverage "any individual employed as an agricultural laborer." The Board's annual appropriation rider directs in effect that in determining whether an employee is an agricultural laborer, the Board shall be guided by the definition set forth in Section 3(f) of the Fair Labor Standards Act. Moreover, it is the Board's policy to follow wherever possible the Department of Labor's interpretation of that section.<sup>3</sup> Section 3(f) of the Fair Labor Standards Act includes "dairying" in the definition of "agriculture." The administrator of that Act has ruled, however, that milk processing is included in the concept of "dairying" only when the processing is of milk produced on the farm involved. Where these operations are performed on milk produced by other farmers or produced on other farms, it is no longer "dairying" entitled to exemption as "agriculture."<sup>4</sup>

Section 3(f) also defines "agriculture" as including "any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market. . . ." In interpreting this section the administrator has ruled: "No practice performed with respect to farm commodities is within the language under discussion by reason of its performance on a farm unless all of such commodities are the products of that farm. Thus, the performance on a farm of any practice, such as packing or storing, which may be incidental to farming operations cannot constitute a basis for exempting employees engaged in such practice if the practice is performed upon any commodities that have been produced elsewhere than on such farm."<sup>5</sup>

As all the eggs handled and 90 percent of the milk processed<sup>6</sup> were produced elsewhere than on Respondent's farm, we find as we did previously that the employees engaged in such processing and marketing operations are not "agricultural laborers."

Accordingly, we further find that by refusing on and after February 2, 1961, to bargain collectively with the Union as the exclusive

<sup>3</sup> *Snake River Trout Company*, 129 NLRB 41; *Olaa Sugar Company, Limited*, 118 NLRB 1442

<sup>4</sup> "Dairying includes the work of caring for and milking cows or goats. It also includes putting milk in containers, cooling it, and storing it when done on the farm. The handling of milk and cream at receiving stations is not included. Such operations as separating cream from milk, bottling milk and cream, or making butter and cheese may be exempt when performed by a farmer or on a farm if they are not performed on milk produced by other farmers or produced on other farms." 29 CFR Sec. 780.11.

<sup>5</sup> 29 CFR Sec. 780.18(c).

<sup>6</sup> There is no evidence that in the processing the milk from Respondent's dairy herd was kept separate and distinct from the purchased raw milk.

representative of employees in the appropriate unit, Respondent violated Section 8(a) (5) and (1) of the Act.

#### 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 its operations as described 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 of commerce.

#### V. THE REMEDY

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

Having found that the Respondent refused to bargain collectively with the Union as the exclusive representative of employees in the appropriate unit, we shall order that the Respondent bargain collectively with the Union, upon request, as the statutory representative of the employees in that unit, and, if an understanding is reached, embody such understanding in a signed agreement.

#### CONCLUSIONS OF LAW

1. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees' Local Union No. 537, is a labor organization as defined in Section 2(5) of the Act.

2. All full- and part-time production and maintenance employees at the Respondent's Arvada, Colorado, processing and marketing operations, including employees engaged in the production or actual handling of dairy products, route salesmen, special drivers, truck-drivers, and helpers, but excluding the Respondent's wife and children, agricultural laborers, office and clerical employees, technical employees, guards, professional employees, foremen, the laboratory and milk plant supervisor, and all other supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. The above-named labor organization was on January 18, 1961, and has been at all times thereafter the exclusive representative of all the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. By refusing to bargain collectively with the above-named labor organization, as the exclusive representative of all the employees in

the unit described above, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

5. By the aforesaid conduct, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

6. 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 this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Edward P. Tepper, d/b/a Shoenberg Farms, Arvada, Colorado, and his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees' Local Union No. 537, as the exclusive bargaining representative of employees in the appropriate unit. The appropriate unit is:

All full- and part-time production and maintenance employees at the Respondent's Arvada, Colorado, processing and marketing operations, including employees engaged in the production or actual handling of dairy products, route salesmen, special drivers, truckdrivers, and helpers, but excluding the Respondent's wife and children, agricultural laborers, office and clerical employees, technical employees, guards, professional employees, foremen, the laboratory and milk plant supervisor, and all other supervisors as defined in the Act.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

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

(a) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees' Local Union No. 537, as the exclusive representative of the employees in the appropriate unit as found above, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Arvada, Colorado, plant, copies of the notice attached hereto marked "Appendix."<sup>7</sup> Copies of such notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for at least 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

**MEMBERS FANNING and BROWN** took no part in the consideration of the above Decision and Order.

<sup>7</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

### NOTICE TO ALL EMPLOYEES

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

**I WILL NOT** refuse to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees' Local Union No. 537, as the exclusive bargaining representative of the employees in the appropriate unit. The appropriate unit is:

All full- and part-time production and maintenance employees at my Arvada, Colorado, processing and marketing operations, including employees engaged in the production or actual handling of dairy products, route salesmen, special drivers, truckdrivers, and helpers, but excluding my wife and children, agricultural laborers, office and clerical employees, technical employees, guards, professional employees, foremen, the laboratory and milk plant supervisor, and all other supervisors as defined in the Act.

**I WILL**, upon request, bargain collectively with the aforesaid labor organization as the exclusive representative of the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

I WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

EDWARD P. TEPPER, D/B/A SHOENBERG FARMS,  
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.

**WATE, Inc. and Local Union 760, International Brotherhood of Electrical Workers, AFL-CIO.** Case No. 10-CA-4540.  
August 29, 1961

### DECISION AND ORDER

On February 13, 1961, Trial Examiner Stephen S. Bean 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 Intermediate Report attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

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

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this proceeding, and hereby adopts the findings,<sup>1</sup> conclusions, and recommendations of the Trial Examiner, with the modifications and additions noted herein.

We agree with the Trial Examiner, for the reasons stated in the Intermediate Report, that Respondent violated Section 8(a)(5) and (1) of the Act by refusing on March 15, 1960, and at all times there-

<sup>1</sup> We find that the appropriate unit includes video technicians, and not radio technicians; that Blair, the Union's representative, heard nothing from the Respondent during the 38 or 39 days following Blair's letter on May 23, 1960, to Linebaugh, the Respondent's representative, and then on July 1, 1960, filed a charge against the Respondent in Case No. 10-CA-4483, alleging a refusal to bargain; and that 18 days elapsed before the Respondent's attorney wrote Blair on July 19, 1960. The inadvertent errors in the Intermediate Report which we are here correcting do not affect the Trial Examiner's ultimate findings and conclusions or our agreement therewith.