any of them not to purchase or install molded fittings manufactured by Speed-Line Manufacturing Company, Inc., or Fibrous Glass Products, Inc., or by any other person.

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, AFL–CIO,
Labor Organization.

Dated_____ By_____
(Representative) (Title)

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 2, 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.

Employees may communicate directly with the Board's Regional Office, 2107 Clark Building, Pittsburgh 22, Pennsylvania, Telephone Number, Grant 1–2977, if they have any question concerning this notice or compliance with its provisions.

United Fryer and Stillman, Inc. *and* **International Union of Operating Engineers, Local No. 1.** *Case No. 27–CA–1128. October 31, 1962*

DECISION AND ORDER

On August 14, 1962, Trial Examiner E. Don Wilson 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 attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief 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 Leedom and Brown].

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, with the modifications noted below.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner with the following modifications:

(1) Paragraph 1(b) and paragraph 2(a) of the Recommended Order are deleted.[1]

[1] The Trial Examiner recommended that the Respondent be ordered to cease and desist from interfering "in any like or related manner" with the rights of its employees under

(2) The Appendix is amended by deleting the words "WE WILL, upon request," appearing in the first paragraph and substituting therefor, "WE WILL not refuse to".

(3) The Appendix is amended by deleting the second full paragraph ("WE WILL NOT, by unlawfully refusing to bargain, etc. . . .").

(4) The Appendix is amended by deleting the words "60 days from the date hereof" in the next to last sentence therein and substituting "60 consecutive days from the date of posting."

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the Act. Since this proceeding arose solely as a result of a legal dispute between the parties as to appropriateness of a multiemployer unit and as the record contains no evidence of antiunion activity by the Respondent, we shall delete this portion of the Recommended Order. See *Pepsi-Cola Louisville Bottlers,* 139 NLRB 463 The Trial Examiner also recommended that the Respondent be ordered affirmatively to bargain with the Union, upon request, for a collective-bargaining agreement We shall not adopt this recommendation in view of the following circumstances. On January 16, 1962, the Respondent, being represented by the Rocky Mountain Meat Dealers Association, and the Union, entered into negotiations for a collective-bargaining agreement and, on February 10, 1962, the Respondent and the Union entered into a 3-year agreement on a single-employer basis This agreement contains one provision relating to premium pay for week-end work, which is not contained in the multiemployer agreement entered into between the Association and the Union at the same time At the hearing, counsel for the General Counsel conceded that the agreement between the Respondent and the Union was a "good contract" and stated in effect that the General Counsel sought only a determination by the Board of the appropriate unit for the purpose of bargaining negotiations between the parties in the future In the circumstances, we deem it unnecessary to order the Respondent to bargain with the Union at this time respecting a *new* collective-bargaining agreement.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Pursuant to due notice, a hearing in this case was held before Trial Examiner E. Don Wilson at Denver, Colorado, on May 28 and 29, 1962. A complaint was issued by the General Counsel of the National Labor Relations Board, herein called the Board, on March 23, 1962, upon a charge filed on December 4, 1961, by International Union of Operating Engineers, Local No. 1, herein called the Union. The complaint alleges, in substance, that United Fryer and Stillman, Inc., herein called the Respondent, refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act. In substance, Respondent denied the allegations of the complaint and interposed affirmative defenses which will be discussed in detail hereinafter. Each of the parties was represented by counsel and each fully participated in the hearing. Oral argument was heard at the conclusion of the hearing. Briefs have been received from all parties and have been considered.

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

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent is a Colorado corporation with its primary place of business located at Denver, Colorado, and at all times material has been engaged in the packing and sale of meat. In the year preceding March 23, 1962, Respondent in the course and conduct of its business in Denver, Colorado, sold and caused to be shipped directly into States other than the State of Colorado from the State of Colorado, goods valued at in excess of $50,000. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Board has jurisdiction of the subject matter of this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local No. 1, is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

1. The issue

Did Respondent, on and after October 9, 1961, violate Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union on a single-employer basis while simultaneously insisting it would bargain with the Union only on a multiemployer basis?

2. Background

For approximately 10 years, some so-called "small packers" in the Denver, Colorado, area have negotiated with the Union and Amalgamated Butcher Workmen Union, Local 641, herein called Local 641, on a multiemployer basis, as members of the Rocky Mountain Meat Dealers Association, herein called Association.[1] Through the years, the membership in the Association has, from time to time, expanded and contracted and contracts with labor organizations, including the Union, have been of varying durations.

The Board, in *Fryer and Stillman, Inc., et al.*, 101 NLRB 1333, found a multiemployer unit of the production employees of the "small packers" who were employer-members of the Association to be appropriate for collective bargaining, as a result of a petition filed by Local 641.

One of the members of the Association, whose employees were included in the multiemployer unit, was Fryer and Stillman, Inc., and it bargained with the Union and Local 641 on a multiemployer basis for some years, until 1959. In November 1959, Fryer and Stillman, Inc., leased for a long term, with an option to buy, its packing plant facilities to Respondent, then newly organized. No part of Respondent has been or is owned or controlled by Fryer and Stillman, Inc., or by anyone connected with it. Respondent is a subsidiary of Food Fair Stores, Inc., a retail food chain operating on the east coast and not in the Denver, Colorado, area. Thirty to forty percent of Respondent's production is shipped to its parent company, the remainder being sold in competition with members of the Association

Following upon the lease of facilities by Fryer and Stillman, Inc., as above described, the Union and Local 641 maintained the position that Respondent was, in effect, a successor to Fryer and Stillman, Inc., and that employee benefits, e.g., seniority, union security, vacation, etc., were to be continued in labor agreements between Respondent and the Union and between Respondent and Local 641

Respondent "acquiesced in and complied with the position of the Union and Local 641" and with the demands described in the preceding paragraph. Respondent negotiated with the Union independently of the Association and as a single employer Negotiations continued for about 11 months. In October 1960, a contract between Respondent and the Union was entered into. It was dated August 3, 1960, and "covered the period of November 30, 1959, to December 4, 1961" Respondent, also, independently of the Association, entered into a contract, for approximately the same period of time, with Local 641.[2]

Bargaining by the Association with the Union has been conducted by an "Employers Council," herein called Council

On June 20, 1961, without notice to the Union, Respondent applied for and obtained membership in the Association. On September 28, 1961, it signed a power of attorney authorizing Council to negotiate in Respondent's behalf, as a member of Association, with the Union and Local 641.

3. Bargaining between the Union and Respondent in 1961–62

On September 25, 1961, pursuant to the terms of the then current contract with Respondent, the Union wrote to Respondent, advising it that the Union was opening the contract for modifications and proposing changes. Respondent was asked to notify the Union as to a convenient time for negotiations.[3]

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[1] They have been known as the "small packer group" to distinguish them from the so-called "Big 4"--Smith, Armour, Cudahy, and Wilson

[2] During the time encompassed by the events hereinabove described, members of the Association who signed contracts with the Union, in some cases, varied from the members who signed contracts with Local 641 Also, during the same period of time, the Union had contracts with at least two of the "Big 4" and two national food chains and at least one "independent Denver packer"

[3] On the same date, the Union sent similar notices to members of the Association who were parties to the then current Association contract and sent contract proposals to the Association

On September 29, 1961, the Association wrote to the Union with respect to the Union's proposals and said that the members of the Association desired to make specific proposals, etc. The Association letter included Respondent as one of the members of the Association in whose behalf the letter was written.

On October 5, 1961, the Union replied to Respondent's September 29, 1961, letter, stating it would not recognize Respondent as part of the Association.

On October 9, 1961, the Association wrote to the Union, questioning the Union's position with respect to considering Respondent as part of the Association and proposing changes in behalf of the Association and its members and changes in behalf of Respondent.

On October 19, 1961, the Union advised the Association and Council again that it would not recognize Respondent and another employer as members of the Association for purposes of negotiation. The Union expressed its readiness to meet with the Respondent and the other employer to negotiate individual contracts with them.

On November 13, 1961, Council on behalf of the Association and its members, specifically including Respondent, made contract proposals to the Union.

On November 30, 1961, the Union wrote directly to Respondent, requesting immediate negotiations for a contract covering Respondent's employees. The Union stated it was not concerned with who represented Respondent in the negotiations but insisted that bargaining with Respondent cover its employees as a unit separate from any other unit of employees.

In the meanwhile, beginning in October 1961, the Union engaged in bargaining negotiations with the Association. Respondent sat in and participated with the other Association members in these negotiations and at all times took the position that it was bargaining with the Union, and also with Local 641, as a member of the Association and that it would not bargain separately with the Union or with Local 641. Until January 16, 1962, the Union insisted it was bargaining only with the Association and not with Respondent.

As previously noted, the Union's charge herein was filed on December 4, 1961 The Regional Director dismissed it on January 10, 1962. On January 16, 1962, the Union advised the Council that pending appeal of the dismissal, it would, without prejudice, bargain in the multiemployer unit with respect to Respondent Subsequently, the Union's appeal was sustained.

Beginning on January 16, 1962, the Union and Respondent, without prejudice to their respective positions regarding the charge, engaged in negotiaions, "Respondent being represented by the Association as a multiemployer unit." On February 10, 1962, Respondent and the Union entered into a collective-bargaining agreement. On the same date, a collective-bargaining agreement was also reached between the Association and the Union.[4] With but few exceptions, the contracts are identical.

4. The units

The parties stipulated that "All shift engineers, apprentice engineers, maintenance men, helpers and oilers employed by Respondent at its plant at East 53d Avenue and Franklin Street in Denver, Colorado, excluding all other employees, guards, professional employees and supervisors within the meaning of the Act, constitute, and at all times material herein, did constitute a unit appropriate for the purposes of collective bargaining," except that Respondent challenges such appropriateness "on the grounds that the appropriate bargaining unit is a multiemployer bargaining group composed of members of the . . . Association."

5. Union's majority

It was further stipulated that the Union, at all times material, has represented for the purposes of collective-bargaining, a majority of the employees in each of the units described in the above paragraph.

Conclusions

As majority representative of Respondent's engineers, *et al.*, in late September 1961, pursuant to the terms of the existing collective-bargaining agreement, the Union requested Respondent to bargain. Respondent's refusal to bargain on and after October 9, 1961, in a unit limited to its employees, was unlawful Respond-

[4] The contracts are in evidence and are dated March 28, 1962 They are effective from December 4, 1961, until December 4, 1964

ent's contention that it was justified in insisting that the Union bargain with it only on a multiemployer basis, through the Association, is without merit.

Presumptively, a single-employer unit limited to Respondent's employees is appropriate, "and to defeat a claim for such a unit in favor of a broader unit, a controlling history of collective bargaining on the broader basis must exist." [5] The Board regularly has looked to the controlling bargaining history and the intent and conduct of the parties.[6]

The Board has held that "the inclusion of a particular employer in a multiemployer unit is based upon the mutual consent of the parties to such inclusion, as evidenced either by a bargaining history for such group of employers in a single unit, or by the express agreement of the parties to the inclusion of the individual employers." [7]

It has been noted that Fryer and Stillman, Inc., for years bargained with the Union on a multiemployer basis through and as a member of the Association but I do not consider this to be a controlling bargaining history of Respondent. A variety of positions are taken by the parties as to whether Respondent is a successor to Fryer and Stillman, Inc. I consider a determination of this question unnecessary. If Respondent is a successor, it demonstrated an unequivocal intent to bargain on a single employer basis, and cease multiemployer bargaining, with the consent of the Union and Local 641, when it entered into the 1959–61 contracts. Such recent bargaining history of two years duration, would be the "controlling bargaining history," in October 1961. If Respondent is not a successor, as a new entity its only bargaining history was on a single-employer basis when, on October 9, 1961, it refused to bargain with the Union on a single-employer basis.

Thus, if Respondent was or was not a successor to Fryer and Stillman, Inc., it had no "controlling" multiemployer bargaining history. Rather, it had a "controlling" single-employer bargaining history on October 9, 1961.

Further, Respondent's application for membership in the Association in 1961 is indicative that prior to that time it did not consider itself either a member of the Association or a part of the multiemployer group which consisted of employer-members of the Association.

I am not persuaded by Respondent's argument that it was entitled to deal with the Union on a single-employer basis for a period of time "to gain some experience to guide it for the future" and that presumably based upon such experience it had the right to become a member of the Association and bargain thereafter on a multiemployer basis. For whatever reason, Respondent and the labor organizations with whom it contracted established a controlling single-employer bargaining history of 2 years.

The presumption that a unit limited to Respondent's employees is appropriate has not been rebutted by any evidence of a controlling history of collective bargaining on a broader basis.

I find that all shift engineers, apprentice engineers, maintenance men, helpers, and oilers employed by Respondent at its plant at East 53d Avenue and Franklin Street in Denver, Colorado, excluding all other employees, guards, professional employees, and supervisors within the meaning of the Act, at all times material, have constituted a unit appropriate for collective bargaining.

I further find that at all times material, the Union has been the exclusive bargaining representative of Respondent's employees in the above unit.

Although requested by the Union so to do, Respondent, since October 9, 1961, has refused to bargain with the Union as the above described bargaining representative.

By such refusal to bargain, Respondent has committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with operations of Respondent 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.

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[5] *Arden Farms, et al*, 117 NLRB 318, 319

[6] *John Breuner Co*, 129 NLRB 394; *Greater St. Louis Automotive Trimmers & Upholsterers Association, Inc*, 131 NLRB 75

[7] *Local Union 49, of the Sheet Metal Workers Association, E D. Brooks, Business Representative (New Mexico Sheet Metal Contractors Association, Inc.)*, 122 NLRB 1192, 1194.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and (5) of the Act, I shall recommend that Respondent cease and desist therefrom and 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, I make the following:

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All shift engineers, apprentice engineers, maintenance men, helpers, and oilers employed by Respondent at its plant at East 53d Avenue and Franklin Street in Denver, Colorado, excluding all other employees, guards, professional employees, and supervisors within the meaning of the Act, constitute, and at all times material did constitute, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. The Union has been since October 9, 1961, and now is, the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. By failing and refusing on October 9, 1961, and thereafter, to recognize and to bargain with the Union as the exclusive representative of the Respondent's employees in the aforesaid appropriate unit the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) 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.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and pursuant to Section 10(c) of the Act, I hereby recommend that United Fryer and Stillman, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Union of Operating Engineers, Local No. 1, as the exclusive representative of all employees in the unit herein found appropriate.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right of self-organization, to join or assist International Union of Operating Engineers, Local No. 1, to bargain collectively with representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Union of Operating Engineers, Local No. 1, as the exclusive representative of the employees in the appropriate unit hereinabove described with respect to their rates of pay, wages, hours of employment, and other conditions of employment.

(b) Post at its Denver, Colorado, establishment, copies of the attached notice marked "Appendix."[8] Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being duly signed by the Respondent's representative, be posted by it 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

[8] In the event that this Recommended Order be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "Pursuant to a Decision and Order"

taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director, in writing, within 20 days from the receipt of this Intermediate Report, what steps the Respondent has taken to comply herewith.[9]

It is recommended that unless on or before 20 days from the date of the receipt of this Intermediate Report and Recommended Order the Respondent notify said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

[9] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL, upon request, bargain collectively with International Union of Operating Engineers, Local No. 1, as the exclusive representative of the following employees:

All shift engineers, apprentice engineers, maintenance men, helpers, and oilers employed by us at our plant at East 53d Avenue and Franklin Street in Denver, Colorado, excluding all other employees, guards, professional employees, and supervisors within the meaning of the National Labor Relations Act.

WE WILL NOT, by unlawfully refusing to bargain with International Union of Operating Engineers, Local No. 1, or in any like or related manner interfere with, restrain, or coerce our employees in violation of the National Labor Relations Act.

UNITED FRYER AND STILLMAN, 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.

Employees may communicate directly with the Board's Regional Office, 609 Railway Exchange Building, 17th and Champa Streets, Denver 2, Colorado, Telephone Number, Keystone 4–4151, Extension 513, if they have any question concerning this notice or compliance with its provisions.

Exchange Parts Company *and* Exchange Parts Company, Rebuilders Service Company, and Southwest Shoe Exchange Company *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, Subordinate Lodge No. 96. *Cases Nos. 16–CA–1579 and 16–CA–1590. October 31, 1962*

DECISION AND ORDER

On June 11, 1962, Trial Examiner Ramey Donovan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate