

## APPENDIX

## NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT promulgate, maintain, or enforce any rule prohibiting our employees during their working time from distributing union literature in nonworking areas of the plant.

WE HAVE notified employees Joseph Lamb and John Wagner that the warnings issued to them on December 6, 1962, have been canceled.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

GENERAL ANILINE & FILM CORPORATION,  
*Employer.*

Dated----- By-----  
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Fourth Floor, The 120 Building, 120 Delaware Avenue, Buffalo, New York, Telephone No. TL 6-1782, if they have any question concerning this notice or compliance with its provisions.

**Food Giant Super Markets; Mayfair Markets, d/b/a El Rancho Markets; Safeway Stores, Inc. and Retail Clerks International Association, Local 727, AFL-CIO. Case No. 28-CA-975. January 24, 1964**

## DECISION AND ORDER

On October 8, 1963, Trial Examiner Wallace E. Royster issued his Decision 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 Trial Examiner's Decision. Thereafter, the Respondents filed exceptions to the Trial Examiner's Decision, and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this 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 Trial Examiner's Decision, the exceptions and brief, and the entire record in

this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.<sup>1</sup>

## ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner.<sup>2</sup>

<sup>1</sup> As noted by the Trial Examiner, this case is indistinguishable from *John Brown et al, d/b/a Brown Food Store*, 137 NLRB 73, enforcement denied 319 F 2d 7 (C.A. 10). See also *The Kroger Company*, 145 NLRB 235. On January 6, 1964, the Supreme Court granted the Board's petition for certiorari in *Brown Food Store, supra* (375 US 962). With all due respect for the opinion of the Court of Appeals for the Tenth Circuit, the Board has determined to adhere to its decision in *Brown Food Store*, pending final resolution of the issue by the Supreme Court.

<sup>2</sup> The Recommended Order is hereby amended by substituting for the first paragraph therein the following paragraph:

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 Respondents, their officers, agents, successors, and assigns, shall:

Moreover, there shall be added to each of the notices recommended by the Trial Examiner the following paragraph:

WE WILL NOT discourage our employees from supporting the Union and from engaging in concerted activities for mutual aid and protection by locking out our employees while continuing operations.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

This matter was tried before Trial Examiner Wallace E. Royster in Tucson, Arizona, on September 9, 1963. The complaint of the General Counsel of the National Labor Relations Board dated August 8, 1963,<sup>1</sup> based upon a charge filed July 8, by Retail Clerks International Association, Local 727, AFL-CIO, herein called the Union, alleges that Food Giant Super Markets, Mayfair Markets, d/b/a El Rancho Markets, and Safeway Stores, Inc., herein called the Respondents, have by means of discharge, layoff, and lockout of their employees engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act.

More specifically, it is complained that the Respondents, members of a multi-employer bargaining association, locked out their employees and continued to operate with temporary replacements because of the circumstance that the Union had struck another employer-member of the bargaining association.

Briefs have been received and considered. The motion of all parties to correct the record in two particulars is hereby granted.

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

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENTS

Each of the Respondents operates retail food markets in the Tucson, Arizona, area, and each during the 12-month period preceding the issuance of the complaint did a gross business in excess of \$500,000. Each during the mentioned period received shipments from points outside the State of Arizona in connection with its operations in amounts exceeding \$50,000. I find that the business of each Respondent is in and affects commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization representing employees of the Respondents.

<sup>1</sup> All dates are in 1963 unless stated otherwise.

## III. THE UNFAIR LABOR PRACTICES

In October 1959, the Union entered into a collective-bargaining agreement with a group of employers consisting of Goodman's Markets, Inc., Mayfair Markets, d/b/a El Rancho Markets, and Safeway Stores, Inc. While this contract was effective, Food Giant Super Markets joined the bargaining group. The contract expired in October 1962, and negotiations looking toward a new agreement began. In January 1963, the Union informed Goodman's and the Respondents that it was authorized to engage in strike action. Pursuant to a petition filed with the National Labor Relations Board by Employers Council, Inc., the bargaining representative for Goodman's and the Respondents, an election was held resulting in the certification of the Union as the bargaining representative of the employees of Goodman's and the Respondents in a single unit. This unit encompassed 24 retail food markets in the Tucson area. There are approximately 275 other retail food markets in the same area whose employees are not so represented.

On May 3, the Union began a strike at Goodman's Markets and picketed the eight stores operated by Goodman in the Tucson area. Less than 25 percent of Goodman's employees struck and all of the Goodman's Markets have remained open. Rulon Goodman, general manager of Goodman's Markets, testified that a representative of the Union, about May 17, in the presence of representatives of the Respondents, told Goodman that it would be possible to "make a deal" with the Union leaving the Respondents "out of this picture." Goodman did not pursue this opportunity. Sometime in June, Goodman met with representatives of the Respondents and told them that he had to have some kind of support or he would be forced to make his peace with the Union. About a week later, at a meeting of the same group, there was a discussion concerning what action to take. The representative of Food Giant Super Markets said that he was not financially able to close his stores; that in the event of a lockout, he must continue operations.

On June 26, the Respondents notified the Union by letter that if the strike against Goodman's continued, it would be treated as a strike against all the employers in the bargaining unit and that a lockout of employees would result. The Union was further notified in this communication that the Respondents intended to continue operations with whatever personnel they could obtain and that the lockout would end as soon as the strike against Goodman's was terminated. On July 3, all employees of the Respondents were notified that since the strike at Goodman's continued, employees represented by the Union would not be permitted to work. On the next business day, July 5, Respondents resumed operations with employees other than those in the bargaining unit. The replacements for the locked-out employees were informed that their employment was temporary and that when the strike was ended the locked-out employees would be recalled to work.

In a case<sup>2</sup> which I find to be indistinguishable from the one at hand, the Board found that the right of employer-members of a bargaining unit to lock out their employees, when one of their number is the target of strike action, cannot lawfully be extended to the point where replacements, even if temporary, are used to continue operations after the lockout. The Board reasoned that "If the struck member operates through replacements no economic necessity exists for the other members shutting down. If in these circumstances they resort to a lockout and hire replacements, it may be reasonably inferred that they did so not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike. In short, the lockout in these circumstances ceases to be 'defensive' and becomes 'retaliatory.'"

Rulon Goodman testified that after the first few weeks of the strike, his gross business receipts showed a rather uniform loss of 22 percent in comparison with the same period in the previous year. There is no reason to doubt this testimony and I accept it. So it appears clear that even though he was able to man and operate his stores, Goodman was affected financially by the strike against his markets. No doubt this tended to indicate to him that a separate agreement with the Union might be sensible. The strike against Goodman thus had a tendency to disrupt the established bargaining unit. When Goodman asked the other employer-members of the unit for aid, the only action suggested, so far as this record indicates, was that all should lock out their employees and it was finally decided to do just that and to continue operations. This development did not increase Goodman's business and it did not appear that it was designed to do so. It did, however,

<sup>2</sup> *John Brown, et al. d/b/a Brown Food Store, et al.*, 137 NLRB 73, enforcement denied 319 F. 2d 7 (C.A. 10).

necessarily weaken the Union. For with increased unemployment among its members, the ability of the Union to support the strike against Goodman's was lessened. As the Board said in the *Brown Food Store* decision, this "may hardly be viewed as equivalent to the defensive action of a shutdown to preserve the solidarity of the [bargaining] unit. On the contrary, since the Respondents were continuing to operate and since no reason appears why they could not have continued to have operated with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity," that is, the strike against Goodman's.

The fact that the Tenth Circuit Court of Appeals has expressed disagreement with the view that the Board took of the problem in *Brown Food Store* is a circumstance which the Board no doubt will consider should this matter reach it on exceptions. It is my obligation as a Trial Examiner to apply established Board precedent, and I do so here. I find that the Respondents, by locking out their employees on July 3 and by continuing to operate with temporary replacements, interfered with, restrained, and coerced their employees in the exercise of their right to bargain collectively and to strike in furtherance of economic demands, and violated Section 8(a)(1) of the Act by replacing them at a time when they were willing to work and were not on strike. I find also that such conduct constituted unlawful discrimination within the meaning of Section 8(a)(3) of the Act in that Respondents thereby discouraged employees from supporting the Union and from engaging in concerted activities for mutual aid and protection.

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

The activities of Respondents set forth in section III, above, occurring in connection with their operations 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 Respondents have engaged in certain unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondents have discriminatorily locked out their employees, it will be recommended that each Respondent offer to his locked-out employees immediate and full reinstatement to their former or substantially equivalent positions, and make whole those of its employees who were the object of this discrimination for any loss of earnings since July 3 by payment to each of a sum of money equal to that which each would have earned since that date to the date of offer of reinstatement. Loss of pay shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289, with a deduction for net earnings in other employment during that period. Backpay shall bear interest at the rate of 6 percent per annum computed quarterly.

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 Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By locking out employees the Respondents have discouraged employees from supporting the Union and from engaging in concerted activities for mutual aid and protection and have thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

3. By the lockout, the Respondents have interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and have thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) 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.

#### RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, I recommend that Food Giant Super Markets, May-

fair Markets, d/b/a El Rancho Markets, and Safeway Stores, Inc., all of Tucson, Arizona, the officers, agents, successors and assigns of each, shall:

1. Cease and desist from:

(a) Discouraging employees from supporting the Union and from engaging in concerted activities for mutual aid and protection by locking out employees while continuing operations.

(b) In any like or similar manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form, join, or assist Retail Clerks International Association, Local 727, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

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

(a) Each Respondent shall offer immediate and full reinstatement to those of its employees who were locked out and make each employee whole for any loss of earnings, following the lockout, in the manner set forth in the section of this decision entitled "The Remedy."

(b) Make available to the Board or its agents, upon reasonable request, all payroll records, social security payment records, attendance records and reports, and all other such data convenient for a calculation of the amount of backpay due under the terms of this Recommended Order.

(c) Each Respondent shall post at its establishments in Tucson, Arizona, copies of the appropriate attached notice marked "Appendix."<sup>3</sup> Copies of said notices, to be furnished by the Regional Director for the Twenty-eighth Region, shall, after being duly signed by authorized representatives, be posted immediately upon receipt thereof and be maintained for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(d) Each Respondent shall notify the Regional Director for the Twenty-eighth Region, in writing, within 20 days from the date of this Decision and Recommended Order what steps it has taken in compliance.<sup>4</sup>

It is further recommended that unless on or before 20 days from the date of receipt of this Trial Examiner's Decision and Recommended Order the Respondents notify the said Regional Director, in writing, that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring such Respondent to take that action.

<sup>3</sup> 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 Recommended Order 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 "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

<sup>4</sup> 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 Respondents have taken to comply herewith."

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### NOTICE TO ALL EMPLOYEES

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WE WILL offer to those of our employees locked out on July 3, 1963, immediate and full reinstatement, each to his former or substantially equivalent position and make each whole for any pay lost by reason of the lockout.

WE WILL NOT by means of an unlawful lockout or in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Retail Clerks International Association, Local 727, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own:

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

FOOD GIANT SUPER MARKETS,  
*Employer.*

Dated----- By-----  
(Representative) (Title)

NOTE.—We will notify such employees presently serving in the Armed Forces of the United States of their right to reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Resident Office, 230 North First Avenue, 3421 Federal Building, Phoenix, Arizona, Telephone No. 261-3717, if they have any question concerning this notice or compliance with its provisions.

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MAYFAIR MARKETS, D/B/A EL RANCHO MARKETS,  
*Employer.*

Dated----- By-----  
(Representative) (Title)

NOTE.—We will notify such employees presently serving in the Armed Forces of the United States of their right to reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Resident Office, 230 North First Avenue, 3421 Federal Building, Phoenix, Arizona, Telephone No. 261-3717, if they have any question concerning this notice or compliance with its provisions.

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WE WILL NOT by means of an unlawful lockout or in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Retail Clerks International Association, Local 727, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own

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

SAFEWAY STORES, INC.,  
Employer.

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

NOTE.—We will notify such employees presently serving in the Armed Forces of the United States of their right to reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Resident Office, 230 North First Avenue, 3421 Federal Building, Phoenix, Arizona, Telephone No. 261-3717, if they have any question concerning this notice or compliance with its provisions.

**Mr. D's No. 2, Inc. and Teamsters Union Local 795, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Meat Cutters Union Local 340, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. Cases Nos. 17-CA-2127 and 17-CA-2128. January 27, 1964**

#### DECISION AND ORDER

On August 22, 1963, Trial Examiner James V. Constantine issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in a certain unfair labor practice, and had not engaged in certain other unfair labor practices. He considered that the unfair labor practice found was an isolated incident for which no remedial order was required, and therefore recommended dismissal of the complaint, as set forth in the attached Intermediate Report. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief. The Respondent filed a reply brief in support of the Trial Examiner's recommendations.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in these cases, and hereby adopts only those findings, conclusions, and recommendations which are consistent with this Decision and Order.

The facts as to the Charging Unions' campaign to organize Respondent's employees and to obtain recognition as their representative are