

the policy of *requiring* the inclusion of truckdrivers where there was disagreement. However, it did not reverse the finding, stated in *Valley of Virginia*, concerning a community of interest between truckdrivers and production and maintenance employees in relation to the flow of materials and products into and out of the plant. Nor did the Board reverse such basic policies as (a) a plantwide unit is presumptively appropriate; (b) a petitioner's desires as to the unit is always a relevant consideration; and (c) it is not essential that a unit be the *most* appropriate unit. The elimination of the policy of *requiring* the inclusion of truckdrivers brought the Board's policy with respect to such employees into harmony with its long-standing and oft-stated policy of not compelling a labor organization to seek representation in the most comprehensive grouping. Where, as here, a labor organization is willing, and seeks, to represent them in a plantwide unit, we agree with the Regional Director that even though they may be away from the plant most or all of the time and do little or no work in the plant, truckdrivers have sufficient community of interest with production and maintenance employees to warrant including them in such a unit.

Accordingly, the case is hereby remanded to the Regional Director for the purpose of holding an election pursuant to his Decision and Direction of Election, except that the payroll period for determining eligibility shall be that immediately preceding the date above.

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**Milk Drivers and Dairy Employees, Local Union No. 537 and Sealtest Foods, a Division of National Dairy Products Corporation and Associated Milk Dealers of Denver, Incorporated.**  
*Case No. 27-CE-1. June 3, 1964*

#### DECISION AND ORDER

On November 26, 1963, Trial Examiner James R. Hemingway issued his Decision 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 Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.<sup>1</sup>

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 Jenkins].

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<sup>1</sup> Respondent's motion for oral argument is denied because, in our opinion, the record, exceptions, and brief adequately set forth the issues and positions of the parties.

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 Trial Examiner's Decision,<sup>2</sup> the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions,<sup>3</sup> and recommendations of the Trial Examiner except as modified herein.

The Trial Examiner's Conclusion of Law No. 3 implies that Respondent also violated Section 8(e) by entering into agreements containing article 20 with employers other than Sealtest. Although the record establishes that the contract with Respondent that Sealtest signed was also signed by other members of the multiemployer association to which Sealtest then belonged, there is no evidence in the record that Respondent reaffirmed article 20 as to such other employers within the Section 10(b) period by insisting on its enforcement or otherwise. We therefore conclude, contrary to the Trial Examiner, that Respondent has violated Section 8(e) only through its reaffirmation of article 20 in its contract with Sealtest.

However, since article 20 may still be included in Respondent's contracts with employers other than Sealtest, we find that it will effectuate the policies of the Act to insure against prospective violations of Section 8(e) on the part of Respondent by ordering it to cease and desist, as the Trial Examiner has recommended, from entering into, maintaining, or giving effect to article 20 or any other contract provision, express or implied, not only with Sealtest but with any employer over whom the Board would assert jurisdiction, whereby such employer ceases or refrains or agrees to cease or refrain from doing business with any other person within the meaning of Section 8(e) of the Act.<sup>4</sup>

<sup>2</sup> In the last paragraph of section III, A, of the Trial Examiner's Decision we correct the Trial Examiner's obvious error that it was the Respondent who declined to give a branch manager an independent distributorship. It is clear that he meant to say, as the record shows, that Sealtest declined to do so.

<sup>3</sup> We agree with the Trial Examiner that a violation of Section 8(e) is established when a respondent, whether an employer or a union, "enters into" an agreement unlawful under that section, by insisting on its enforcement within the Section 10(b) period. As we said in *Dan McKinney Co.*, 137 NLRB 649, 657, where an employer was the only respondent, ". . . such enforcement, whether or not it was sought, assented to, or acquiesced in by the other party to the contract is within the scope of the prohibition of Section 8(e) against entering into such contracts. . . ." See also *Local 585 of the Brotherhood of Painters, Decorators & Paper Hangers of America, AFL-CIO*, et al. (*Falstaff Brewing Corporation*), 144 NLRB 100, finding a violation of Section 8(e) on the part of the unions who were the only respondents, based solely on their attempted enforcement of an illegal provision within the 10(b) period. Moreover, even if acquiescence in an illegal provision by the other party to the contract is an essential element of an "entering into," we would find it in this case by Sealtest's action in declining to give its manager in Colorado Springs an independent distributorship unless he agreed to comply with the provisions of the contract. *Automotive, Petroleum & Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, etc. (Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc.)*, 134 NLRB 1363, 1370.

<sup>4</sup> *Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Van Transport Lines, Inc.)*, 131 NLRB 242, 244. enf'd. 298 F. 2d 105 (C.A. 2); *Ohio Valley Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, et al. (*Cardinal Industries, Inc.*), 136 NLRB 977, 991.

## ORDER

Pursuant Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner and orders that Respondent, Milk Drivers and Dairy Employees, Local Union No. 537, its officers, agents, representatives, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

## TRIAL EXAMINER'S DECISION

## STATEMENT OF THE CASE

Upon a charge dated May 10, 1963, but filed on May 21, 1963, by Carl W. Perry, zone manager, Sealtest Foods, a Division of National Dairy Products Corporation (the name of the corporation herein will be referred to as Sealtest), against Milk Drivers and Dairy Employees, Local Union No. 537, herein called Respondent, a complaint was issued on July 16, 1963, alleging a violation by Respondent of Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act. The Associated Milk Dealers of Denver, Incorporated, herein called Associated, was joined as a party to the contract.

The Respondent filed an answer on July 26, 1963, in which it made certain admissions (including the execution of the alleged contract provision) but raised questions as to the constitutionality of Section 8(e) of the Act, the application of the 6 months' limitation under Section 10(b) of the Act, and alleged nonjoinder of parties. The answer denied the commission of any unfair labor practices. A hearing was held in Denver, Colorado, on August 28 and 29, 1963, before Trial Examiner James R. Hemingway. Associated did not appear. Each of the other parties was represented by counsel. At the close of the hearing, a time was fixed for the filing of briefs and, within such time, each of the parties who appeared at the hearing filed a brief with the Trial Examiner, each of which has been fully considered.

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

## FINDINGS OF FACT

## I. THE BUSINESS OF SEALTEST AND ASSOCIATED

Sealtest is a Delaware corporation, maintaining its principal office in New York, New York. It has, at all times material herein, maintained an office and plant at Englewood, Colorado, a suburb of Denver, where it is engaged in the manufacturing, processing, and distribution of dairy products. In the course and conduct of its business in the State of Colorado, Sealtest annually receives goods and materials valued in excess of \$50,000 directly from outside the State of Colorado.

Associated is an association of milk dealers in the area of Denver, Colorado, bound for collective-bargaining purposes. Its members are engaged in the manufacturing, processing, and distribution of milk and milk products within the State of Colorado. In the operation of their combined businesses in the State of Colorado, the members of Associated annually receive goods and materials valued in excess of \$50,000 directly from outside the State of Colorado.

No issue is raised as to the Board's jurisdiction based on the facts of commerce. I find that the Board has jurisdiction.

## II. THE LABOR ORGANIZATION

The Respondent is a labor organization representing employees of Sealtest, among others, in collective bargaining. It has a contract with Sealtest and Associated members covering, among other employees, route salesmen, said contract being for a 4-year term expiring in the spring of 1964.

## III. THE UNFAIR LABOR PRACTICES

A. *The facts*

In April 1960, and until April 1961, Sealtest was a member of Associated. In April 1960 Associated engaged in collective bargaining with Respondent. The result was a 4-year contract, expiring (depending on the area covered) in April or May 1964. Article 20 of this contract, the only one complained of, reads:

Sale of Routes. The employer agrees that in the event any of the presently established routes or routes established in the future are sold to anyone, the route driver who services the said route will come under the provisions of this Agreement and must adhere to all conditions with regard to days off, days the route operates, etc.<sup>1</sup>

Respondent's answer "admits that Respondent is continuing to maintain and give effect to the contract clause" above set forth "by invoking its provisions to extend the benefits of the contract to the employers' route drivers who are classified by the employers as 'independent-operators,'" but it denies that it "has maintained or enforced the said contract clause so as to induce or require any employer to cease or refrain from handling, using, selling, transporting or otherwise dealing in the products of any other employer, or from doing business with any other person, or for any other improper or illegal purpose."

Late in 1961, Sealtest, after notifying Respondent of its intent to do so, turned over to former employees and other individuals who had not been employees the servicing of certain routes as independent operators. Respondent, taking the position that all such operators should come under the contract, invoked the arbitration clause of the contract, contending that Sealtest had violated article 20 of the contract. The decision of the arbitrator, dated June 5, 1962, favorable to Sealtest, found that the independent operators were not employees of Sealtest.

The General Counsel adduced evidence that Respondent, on December 14, 1962, reiterated its position that in the event that Sealtest transferred any of its routes to independent distributors, the latter had to comply with all conditions of the contract. This was denied by Respondent's witnesses. The General Counsel offered such evidence to show that, within 6 months of the time of the filing of the charge, Respondent had reaffirmed and maintained in effect said article 20 of the contract. For the reason hereinafter stated, I find that a credibility resolution of this conflict is unnecessary.

The General Counsel, for the same purpose, adduced evidence to show that, in the first part of 1963, the Respondent declined to give its Colorado Springs branch manager an independent distributorship in that area unless he complied with all the provisions of the contract. The branch manager declined to take the distributorship under such conditions. Thereafter, the charge in this case was filed. Upon receiving notice of the filing of the charge, Respondent's secretary-treasurer, Paul Ashcraft, telephoned Manager Perry of Sealtest to ask why the charge was filed. Learning that the charge related to the aforesaid article 20, Ashcraft asked why Sealtest was not going to go through the "machinery of the contract," which I interpret to mean provisions of the contract for settlement of disputes, including the arbitration clause. From this, I infer that he meant that Respondent would oppose any assignment of routes to independent contractors unless the latter were required to adhere to all provisions of the contract. Indeed, Ashcraft admitted on cross-examination at the hearing in this case that this was still the Respondent's position.

### B. Arguments and conclusions

Respondent, in its answer, questions the constitutionality of Section 8(e) of the Act. At Board level, this defense cannot, of course, be considered. The Act must be assumed to be constitutional in the absence of a binding court decision to the contrary.<sup>2</sup>

Respondent contends that no unfair labor practice occurred within 6 months of the date of the filing of the charge and that any finding of an unfair labor practice is therefore barred by the provisions of Section 10(b) of the Act.<sup>3</sup> This defense

<sup>1</sup> The same language appeared in the contract involved in *United Dairies, Inc.*, 144 NLRB 153, but in that case no 8(e) issue was raised.

<sup>2</sup> *Chauffeurs, Teamsters and Helpers "General" Local Union No. 200, International Brotherhood of Teamsters, etc. (Milwaukee Cheese Company)*, 144 NLRB 826.

<sup>3</sup> Respondent argues that even if it should be found that the discussion of article 20 took place on December 14, 1962, as the General Counsel contends, such an "abstract discussion concerning the correct interpretation of a contract" does not constitute an unfair labor practice in violation of Section 8(e). This argument fails to distinguish the unfair labor practice from evidence which tends to establish such an unfair labor practice. The unfair labor practice would be "entering into" a contract prohibited by Section 8(e). The discussion of December 14, 1962, if it took place, would be evidence of reaffirmation of the contract tending to prove a continued maintenance of the contract amounting to an "entering into."

assumes the validity of article 20 to the extent admitted in the answer. If, however, that article were found to be illegal, even within the limitation admitted in the answer, Section 10(b) would not prevent the finding of an unfair labor practice, for the Board has held that a violation of Section 8(e) is shown by a mere reaffirmation of the contract within the 6 months' period by either party,<sup>4</sup> and that a concession by the respondent that the illegal clause is enforced or given effect or is maintained in effect is sufficient proof of an "entering into."<sup>5</sup> This being true, and since the Respondent admittedly is maintaining article 20 as well as the other provisions of the contract, I find no need to consider the effect of Sealtest's purported, unilateral act of living up to the agreement without the knowledge of Respondent.<sup>6</sup>

Respondent, in its answer, claims that there is a nonjoinder of indispensable parties—parties to the contract which contains article 20. Although Associated, which negotiated the contract, was made a party, Respondent claims that other signers of the contract were not members of Associated and that Associated may not presently even be the agent of some who have, like Sealtest, since the execution of the contract, withdrawn from membership.<sup>7</sup> Such argument might have more merit if a remedy were being sought against all the contract signers. A remedy in this case is not sought even against Sealtest or Associated. Furthermore, Respondent seems to recognize that the contract is not a joint obligation of all signers, for Respondent states in its brief that the real parties to the contract are the individual employers and not Associated, who acted only as their agent. With this, I concur. Each signer has bound himself only to the extent of his own employees and business operations; so actually we have numerous identical, separate contracts, not one joint one. Hence, although others might be proper parties, since the language being construed is identical, they are neither necessary nor indispensable. There is no limit to the number of employers whom Respondent might induce to bind themselves to contract terms identical to those contained in the contract negotiated by Associated. Some of these employers might have signed such contract even after the hearing in this case closed. It could not seriously be argued that they, too, were indispensable parties.

In *N.L.R.B. v. Sterling Furniture Company, et al.*, 202 F. 2d 41 (C.A. 9), a contract containing an illegal union-shop clause had been executed by an association of employers, on behalf of its members, including Sterling Furniture Company. Only Sterling and the union were made parties. Yet the Board was required to find that the contract clause was illegal despite nonjoinder of other employers. It directed an order against Sterling, alone, of the employers. The Board's order against the union in that case was found by the court to be too broad, not because the union

<sup>4</sup> *Milk Drivers' Union, Local 753, International Brotherhood of Teamsters, etc. (Pure Milk Association; Sidney Wanzer & Sons, Inc.)*, 141 NLRB 1237; *Dan McKinney Co.*, 137 NLRB 649; *Automotive, Petroleum & Allied Industries Employees Union, Local 618, affiliated with the International Brotherhood of Teamsters, etc. (Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc.)*, 134 NLRB 1363; *Los Angeles Mailers Union No. 9, I.T.U. (Hillbro Newspaper Printing Company Division of Hearst Publishing Company)*, 135 NLRB 1132.

<sup>5</sup> *General Teamsters', Warehousemen and Helpers' Union Local No. 890 (San Joaquin Valley Shippers' Labor Committee, et al.)*, 137 NLRB 641; *Retail Clerks Union, Local 770; et al. (The Frito Company, Western Division)*, 138 NLRB 244.

<sup>6</sup> The General Counsel contends that the unilateral act of Sealtest in refusing to grant a distributorship in Colorado Springs except in compliance with the contract removes the case from the bar of Section 10(b) of the Act, citing the *Dan McKinney* decision, *supra*, where the Board found that even though only the employer took action implementing the contract during the period covered by the charge, a violation of Section 8(e) could be found. However, in the *McKinney* case, the employer, not the union, was the respondent. That case did not hold that such unilateral act by the employer who was not a respondent would be proof of a violation, within the 6-month period, by the union without evidence of some reaffirmance or enforcement of the contract by the latter. Cf. *Retail Clerks Union, Local 770; et al.*, 138 NLRB 244, where both employers and unions were respondents, and *Automotive Petroleum & Allied Industries Employees Union, Local 618*, 134 NLRB 1363, where, although only the union was a respondent, the Board found action by the union reaffirming the current effectiveness of the invalid clause within the 6-month period before the filing of the charge.

<sup>7</sup> Respondent concedes that, if such contract parties are not made parties to this proceeding, they could insist that Respondent comply with all the provisions of the contract, including article 20, even if that were held to be illegal in this case. Since article 20 is a benefit to Respondent but only an obligation or restriction to the employer, Respondent's fear is groundless.

was ordered to cease and desist giving effect to the illegal union-shop clause as applied to employers other than Sterling whose business affected interstate commerce, even though they were not made parties to the proceedings, but only because it was so broad as to affect the union's rights under contracts between the union and employers whose businesses did not affect interstate commerce, as to whom even a closed-shop clause would not have been illegal. I conclude and find, therefore, upon a consideration of all the circumstances presented in the case before me that there is no fatal nonjoinder of parties.<sup>8</sup>

On the merits of the case, Respondent argues that article 20 was not adopted for the purposes sought to be prohibited by Congress when it enacted Section 8(e) of the Act. Rather, Respondent argues, it was adopted for the protection of employees from the evils of the peddler system. It is not my function to consider either the merits or evils of the peddler system. Nor is it my function to decide what the legislature might have enacted had it weighed and considered the merits or evils of the peddler system. Even if I had the privilege of considering such matters in a case of first impression, this is not such a case. I am bound by the interpretation of Section 8(e) of the Act as heretofore determined by the Board and courts. In applying such interpretation, the Board has drawn a definitive line between cases where a union, in attempting to retain for the employer's employees the work regularly performed by them, enters into a contract which prohibits all subcontracting of work that could be performed by such employees and cases where, although subcontracting of work is permitted by the contract, the employer is restricted in his liberty to deal with others, as where subcontractors must agree to be bound by the terms and conditions of the main contract or certain of such conditions as are favorable to the union. The former type of restriction, the Board has held, does not necessarily violate Section 8(e) of the Act,<sup>9</sup> but the latter type does violate the Act.<sup>10</sup>

Although the language of article 20 does not specifically limit itself to independent contractors who are route drivers (that is, peddlers), it is broad enough to cover such persons, among others, and the history of the negotiation of article 20, as related in the testimony at the hearing, removes all doubt that the main concern of Respondent was the peddler system. In fact, Respondent concedes that this was the purpose of the clause both in its answer and brief to the Trial Examiner. In its brief, Respondent traces the history of the peddler system and the reasons for use thereof by employers. From the outset, unions have attempted to prevent employers, according to Respondent's brief, from jeopardizing the standards of employment gained in collective bargaining by resort to the peddler system. Assuming, for the sake of argument, that, despite its broad language, article 20 does not extend to persons other than peddler route drivers. I would still be unable to conclude, under the Board's interpretation of Section 8(e) of the Act, that article 20 of the contract here under scrutiny is not a violation of the Act.

Article 20 is almost identical in purpose with the objects more specifically spelled out in the contract involved in *Joint Council of Teamsters No. 38, et al., Arden Farms Co., et al. (California Association of Employers)*, 141 NLRB 341, and in *Chauffeurs, Teamsters and Helpers "General" Local Union No. 200, etc. (Milwaukee Cheese Company)*, 144 NLRB 826, where the Board found violations of Section 8(e) of the Act. True, article 20 of Respondent's contract permits the sale (interpreted by the parties to mean "assign" or "transfer") of any presently established routes or routes established in the future to "anyone" (which would include persons who were not, and would not become, employees of Sealtest), but this is permitted by the contract only if the route driver who services the said route (which would include an independent contractor or the employees of an independent contractor) comes under the provisions of the agreement (including, apparently, membership

<sup>8</sup> Even if the Board should find it desirable to join other contract signers, it could do so under Section 10(b) of the Act by amendment to the complaint at any time prior to the issuance of an order based thereon. The complaint need not be dismissed because of a nonjoinder, therefore.

<sup>9</sup> *Milk Drivers and Dairy Employees Union, Local 546, International Brotherhood of Teamsters, etc. (Minnesota Milk Company)*, 133 NLRB 1314, enfd. 314 F. 2d 761 (C.A. 8).

<sup>10</sup> *Automotive Petroleum & Allied Industries Employees Union, Local 618, etc.*, 134 NLRB 1363, enfd. sub nom. *District No. 9, I.A.M., AFL-CIO v. N.L.R.B.*, 315 F. 2d 33 (C.A.D.C.); *General Teamsters', Warehousemen and Helpers' Union, Local No. 890*, 137 NLRB 641; *Joint Council of Teamsters No. 38, et al., Arden Farms Co., et al. (California Association of Employers)*, 141 NLRB 341; *Local 585 of the Brotherhood of Painters, Decorators & Paper Hangers of America, AFL-CIO, et al. (Falstaff Brewing Corporation)*, 144 NLRB 100; *Thomas Kennedy, et al. (Arthur J. Galligan)*, 144 NLRB 228.

in Respondent under article 2) and adheres to all conditions with regard to days off, days the route operates, etc. In effect, this clause is an agreement not to do business with anyone who does not so qualify.

Respondent takes the position that article 20 is not intended to prevent Sealtest or any other signatory employer from selling its routes to a bona fide employer, presumably a competitor, but is only intended to prevent the signatory employers from establishing a peddler system. Calling a route driver a "peddler" does not alone determine whether he is an employee of the company whose goods he sells or is in fact an independent contractor. To the extent that article 20 applies only to nonindependent peddlers, that is, employees, it does not violate Section 8(e), and Respondent may deter the employer from escaping its lawful obligations by pretense. However, if the route driver is, indeed, an independent contractor, Respondent is prohibited by Section 8(e) from restricting Sealtest or any other signatory employer from doing business with such independent contractor. Whether or not a route driver who handles the products only of one producer can truly be an independent contractor<sup>11</sup> is a question which Respondent obviously would like to have answered negatively, but this question is not in issue here and I make no decision with respect thereto.<sup>12</sup> I decide only that the language of article 20 goes beyond lawful limits in extending to "anyone."

Respondent suggests that the language of article 20 is too vague to be susceptible of construction and therefore cannot be held to violate Section 8(e) of the Act, citing *Minnesota Milk Company, supra*. If article 20 is ambiguous, however, doubt as to its meaning has been removed by evidence adduced at the hearing with regard to the interpretation which the parties themselves put on it. This interpretation satisfies me that the parties intended to restrict the transfer of, or establishment of, routes serviced by route drivers, whether or not such drivers were genuinely independent contractors, unless such route drivers should come under all the provisions of the contract. Respondent is not explicit in its reasons for considering article 20 as too vague or ambiguous to be susceptible of construction. Perhaps Respondent has in mind the use of the vague "etc." at the end of article 20. If article 20 of the contract did not also contain the language "the route drivers . . . will come under the provisions of this Agreement," I might be disposed to agree that in the phrase "must adhere to all conditions with regard to days off, days the route operates, etc.," the use of "etc." might create a problem of enforcement in a specific case beyond "the days off" and "days the route operates," but this does not prevent the explicit language that the "route driver . . . will come under the provisions of this Agreement" from being understood, and this language provides the restriction which is prohibited by Section 8(e) of the Act.<sup>13</sup>

On the basis of all the evidence in the case, the Board decisions, and all the law applicable hereto, I conclude and find that by maintaining in effect, within a period of 6 months prior to the filing of the charge, article 20 of the contract between Respondent and Associated, including Sealtest, Respondent has "entered into" a contract in violation of Section 8(e) 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 the business 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.

<sup>11</sup> To date the law has not, so far as I know, recognized a hybrid type of "restricted independent contractor," one who is neither an employee nor a fully independent contractor.

<sup>12</sup> This question has been decided with reference to such persons as Respondent calls "peddlers," to the extent required by the facts, in *Milk Drivers and Dairy Employees Union, Local No. 546, etc. (Minnesota Milk Company)*, 133 NLRB 1314, aff'd. 314 F. 2d 761 (C.A. 8).

<sup>13</sup> I find inapposite the cases cited by Respondent which consider violations of Section 8(a) (5) of the Act. Even if the court decisions cited, such as *Retail Clerks Union Local 770, Retail Clerks International Association, AFL-CIO (United States Hardware and Paper Company, et al.) v. N.L.R.B.*, 296 F. 2d 368 (C.A.D.C.), dealing with Section 8(b) (4), were applicable to Section 8(e) cases, I am bound by the Board's decisions in all jurisdictions except the one in which the Board has been reversed by the circuit court. A decision of the Circuit Court of the District of Columbia is not binding in Colorado.

## V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend an order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Respondent, in its brief, has supplied the names of employers other than Sealtest and Associated with whom it has identical contracts containing article 20 as set forth above. It does not appear with certainty, however, that such employers, other than Sealtest and Associated, are engaged in commerce within the meaning of the Act. If any be not, it may be that Respondent can lawfully include article 20 in a contract with such employer. However, if any other employer be engaged in commerce within the meaning of the Act, Respondent cannot maintain or enforce article 20 as to him. I shall, therefore, recommend a remedy which is broad enough to insure that the Act is not, in the future, similarly violated as to any employer over whom the Board has, and would assert, jurisdiction.

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. Milk Drivers and Dairy Employees, Local Union No. 537, Respondent herein, is a labor organization within the meaning of Section 2(5) of the Act.
2. Sealtest and Associated are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
3. By entering into contracts containing article 20, whereby Sealtest and members of Associated agree to cease or refrain from doing business with another person or other persons, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(e) of the Act.
4. Such 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 foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the Respondent, Milk Drivers and Dairy Employees, Local Union No. 537, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from entering into, maintaining, or giving effect to article 20 or any other contract provision, express or implied, with Sealtest, Associated, or any other employer over whom the Board has, and would assert, jurisdiction under the Act, whereby such employer ceases or refrains or agrees to cease or refrain from doing business with any other person within the meaning of Section 8(e) of the Act.

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

- (a) Post in Respondent's business offices and meeting halls copies of the attached notice marked "Appendix."<sup>14</sup> Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region of the Board, shall, after having been duly signed by official representatives of Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all other places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

- (b) Furnish to said Regional Director a sufficient number of signed copies of the aforementioned notice for posting by Sealtest, by each member of Associated, and by other employers with whom Respondent has contracts containing aforesaid article 20 and who are engaged in commerce within the meaning of the Act, and over whom the Board would assert jurisdiction, for posting by such employers, if they are willing, in places where notices to employees are customarily posted.

<sup>14</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."

Copies of said notice, to be furnished by said Regional Director, shall, after having been signed by Respondent, as indicated, be forthwith returned to said Regional Director for disposition by him.

(c) Notify said Regional Director, in writing, within 20 days from the date of service of this Trial Examiner's Decision, of what steps the Respondent has taken to comply herewith.<sup>15</sup>

It is further recommended that, unless on or before the expiration of said 20 days, Respondent shall have notified said Regional Director, in writing, that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the action aforesaid.

<sup>15</sup> In the event 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 Respondent has taken to comply herewith."

#### APPENDIX

#### NOTICE TO ALL OUR MEMBERS AND TO ALL EMPLOYEES OF EMPLOYERS WHO ARE PARTIES TO OUR CONTRACT WITH ASSOCIATED MILK DEALERS OF DENVER, INCORPORATED

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 give notice that:

WE WILL NOT enter into, maintain, or give effect to article 20 of our contract with Associated Milk Dealers of Denver, Incorporated, and with other signatories to said contract, including Sealtest Foods, a Division of National Dairy Products Corporation, or any other contract provision whereby any such employer ceases or refrains or agrees to cease or refrain from doing business with any other person within the meaning of Section 8(e) of said Act.

MILK DRIVERS AND DAIRY EMPLOYEES,  
LOCAL UNION No. 537,  
*Labor Organization.*

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, 609 Railway Exchange Building, 17th and Champa Streets, Denver, Colorado, Telephone No. Keystone 4-4151, Extension 513, if they have any questions concerning this notice or compliance with its provisions.

**Wavetronics Industries, Inc. and International Union, United Automobile, Aerospace & Agricultural Workers of America, AFL-CIO.** *Case No. 4-CA-3136. June 3, 1964*

#### DECISION AND ORDER

On March 30, 1964, Trial Examiner Herbert Silberman issued his Decision 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 Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and supporting comments.<sup>1</sup>

<sup>1</sup> Having duly considered the matter, Respondent's request for oral argument is hereby denied.