All our employees are free to become or remain, and to refrain from becoming or remaining, members of United Steelworkers of America, AFL–CIO, or any other labor organization, 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.

SHAKESPEARE COMPANY; SHAKESPEARE PRODUCTS COMPANY,
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, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan, Telephone No. 963–9330, if they have any question concerning this notice or compliance with its provisions.

Royal Plating and Polishing Co., Inc. *and* Metal Polishers, Buffers, Platers and Helpers International Union, Local 44, AFL–CIO. *Case No. 22–CA–1640. May 14, 1965*

SUPPLEMENTAL DECISION AND ORDER AMENDING ORDER

On August 27, 1964, the National Labor Relations Board issued its Decision and Order in this case.[1] In its Decision the Board concluded, on the basis of the findings of fact set forth in its Decision and more fully set forth in the Trial Examiner's Decision, that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, "by failing to disclose to the Union, while it and the Union were engaged in contract negotiations, its intention to shut down operations at its Bleeker Street plant, and by unilaterally, and without notice to the Union, closing down the plant." The Board's Order required Respondent to cease and desist from the unfair labor practices found and to take certain affirmative action designed to remedy the unfair labor practices.[2] On April 21, 1965, the United States Court of Appeals for the Third Circuit, acting upon a motion of the Board to remand the case for reconsideration, ordered that the case be remanded to the Board for the limited purpose of considering whether, and to what extent, the decision by the Supreme Court of the United States in *N.L.R.B.* v. *Darlington Mfg. Co.*, 380 U.S. 263, affects this case. On

[1] 148 NLRB 545.

[2] Affirmatively, the Board's Order required Respondent to create a preferential hiring list for use in the event the Respondent voluntarily resumed operations containing the names of all employees laid off between April 30 and July 1, 1963, i.e., the Bleeker plant employees, to bargain with the Union upon request in the event Respondent resumed operations, and to make Bleeker plant employees whole for any loss of pay they may have suffered by reason of the unfair labor practices by paying to each of them a sum of money equal to the amount he would have earned as wages from the date of his termination of employment on or after April 30, 1963, to the time he secured equivalent employment elsewhere, but in no event past the date of December 4, 1963, the date Respondent was required to vacate the Bleeker Street premises under its agreements concerning the sale of such premises.

April 23, 1965, the Board, by telegraphic order served on the parties to the case, ordered that the parties be afforded an opportunity to file briefs on the issue remanded to the Board. Briefs were filed pursuant to such order by Respondent, the General Counsel, and the Charging Party.

The Board has reconsidered its decision in this case in the light of the Supreme Court's decision in the *Darlington* case, and has considered the positions and arguments presented in the briefs of the parties relating to the applicable *Darlington* decision to this case. The Board has concluded that the *Darlington* decision does not require alteration in its conclusions concerning Respondent's bargaining obligation in this case.

The issue presented by the pleadings and the trial record of this case is whether Respondent's failure and refusal to notify the Union, and to discuss with it, the decision to close Respondent's Bleeker Street plant violated Section 8(a)(5). The Bleeker Street plant was one of two plants operated by Respondent. The employees of the two plants constituted a single unit appropriate for purposes of collective bargaining.[3] In these circumstances, we view this case as involving a refusal to bargain over a partial closing of a business, rather than a refusal to bargain over a complete closing or total cessation of business.

On or about April 1, 1963, Barile, Respondent's president, reached a decision to close down the Bleeker Street plant without, however, determining the date upon which the plant would be shut down. It is undisputed that the decision was made because of economic considerations.

The subsequent events attending the implementation of this decision are fully set forth in our original decision in this case and need not be repeated here. We stress, however, that there is nothing in Barile's subsequent conduct to indicate anything other than that such decision related solely to closing down the Bleeker Street plant. Indeed, when the employees and their Union finally suspected what was happening —because of Barile's action in turning down new orders and laying off Bleeker Street employees—and asked Barile if he was going out of business, he assured them, "No, I am getting smaller, I am trying out something" and "No, I am not closing down, I am just liquidating," and that liquidating did not mean that he was going out of business.

On June 14, 1963, Barile finally notified the Union that the Bleeker Street plant had been sold and would be closed down. Nothing was said at this time about closing down the Sussex Avenue plant. Accord-

[3] The complaint, as amended on the record by agreement of the parties, alleged that employees of the Respondent's New Jersey plant constituted an appropriate bargaining unit. It was stipulated by the parties that employees of the Bleeker Street plant and the Sussex Avenue plant voted in the election that resulted in the Union's certification as bargaining representative of Respondent's employees. The Employer concedes and argues that the two plants constituted a single unit.

ing to Barile's testimony on cross examination he did not view the sale of the Bleeker Street plant to the Housing Authority as finishing his business, rather he thought it would give new life to his business.[4]

It was not until the end of July, 1 month after the cessation of operations at the Bleeker Street plant, and more than 2 months after Barile commenced laying off Bleeker Street employees, that he decided to close down the Sussex Avenue plant. On August 26, 1963, Barile notified the Union that he had decided to dispose of the Sussex Avenue plant offering to discuss and consider the matter with the Union, and informing the Union that Respondent had discussed the possible sale of the plant to certain employees who were interested. As noted in the Trial Examiner's Decision, there was no charge or allegation in the complaint that the sale and closedown of the Sussex Avenue plant, which marked Respondent's termination of business, violated Section 8(a)(5).

On the basis of the foregoing, we believe it readily apparent that the issue litigated and decided in this case was whether Respondent's failure and refusal to notify the Union and to discuss the partial closing of its business through the shutdown of the larger of its two plants violated Section 8(a)(5) and (1) of the Act.[5] We believe it also apparent that the decision to sell and close down the Bleeker Street plant was made in the hope and expectation, at least at the time of the making and the effectuation of that decision, that the money realized from the sale of the property and the savings realized from not operating the plant would enable Respondent to continue its plating operation at the Sussex Avenue plant.

In view of our holding that this involves only the partial closing of a business, we are not here faced with the question of whether a decision to go out of business completely is a mandatory subject of bargaining. Consequently, we need not, and do not, determine the impact on that question of the Supreme Court's holding in the *Darlington* case "... that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness towards the Union, such action is not an unfair labor practice."

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[4] Barile was asked whether he understood that giving an option to the Housing Authority to buy the Bleeker Street plant meant that his business was finished He replied no, that he thought it would bring new life to the business. According to an affidavit Barile gave to a Board Agent, dated July 2, 1963, Barile stated, "We have decided to continue the Sussex Avenue plant on a three shift basis for a couple of months to determine whether under those circumstances the Sussex Avenue plant can show a profit."

[5] Respondent contends that the Board's motion to remand and portions of the Board's brief filed with the Court constitute a concession that our previous Decision and Order herein are premised on a finding that Respondent failed to bargain concerning a decision to terminate its business. We have no desire to quarrel with Respondent over semantic niceties as to these two documents We do not, however, make any such concession. As already indicated, we do not believe the issue of a total closedown is presented in this case. We believe, instead, that this case presents only the issue of Respondent's failure to notify the Union and discuss with it it's decision to discontinue operations at the Bleeker Street plant

We perceive nothing in that portion of the *Darlington* decision dealing with the discriminatory partial closing of a business which warrants withholding application of the Act's collective-bargaining provisions to Respondent's decision to close down the Bleeker Street plant. The Supreme Court clearly indicated that managerial decisions to close a part of an integrated business are subject to the Act's provisions prohibiting discrimination with respect to hire and tenure of employment when such discrimination is practiced for the purpose of encouraging or discouraging union membership. In short, under *Darlington*, Respondent's decision to close down the Bleeker Street plant, one of the two plants comprising a single appropriate bargaining unit, would be a proper subject of scrutiny under the provisions of Section 8(a)(3) under the Supreme Court's ruling in the *Darlington* case. In these circumstances, we perceive no reasonable basis on which it can be said that the Court's decision requires a holding that a partial closing is not a subject for scrutiny under Section 8(a)(5).

The fact that Respondent sold and closed down the Bleeker Street plant because of economic considerations provides no basis for exempting that decision from the mediatory influence of the Act's collective-bargaining provisions, although it, of course, does explain why no 8(a)(3) violation was alleged. Plainly, Respondent's decision to close down the Bleeker Street plant, and the Union's efforts to bargain concerning that decision and its impact on employees related to employees' "terms and conditions of employment." *The order of Railroad Telegraphers, et al.* v. *Chicago and North Western R. Co., a Corporation*, 362 U.S. 330; *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203. The fact that the decision was based on economic considerations made it particularly amenable to the procedures of collective bargaining. For under such procedures, the Respondent would not have surrendered its managerial right to run its business and to take those steps which its business judgment satisfied it were necessary. All that was required here was that Respondent bargain in good faith about the termination of the Bleeker Street plant with its employees' bargaining representative to give its employees an opportunity to persuade it to achieve similar economies through negotiation of an acceptable alternative. The Act requires that an employer give the employees' bargaining representative notice and opportunity to confer about and discuss the closing down of a plant not for the purpose of securing the employees' agreement before he may proceed, but to give his employees an opportunity to induce him to follow a different course of action which may safeguard both his and their rights and interests.

In closing down the Bleeker Street operation and selling the capital equipment, Respondent did not merely withdraw its capital from the enterprise; Respondent also deprived employees of jobs in which they had invested years of work, had built up seniority rights, and may have

had other rights, all of which became relatively worthless upon discontinuance of the operation of the plant. "[A]lthough it is not possible to say whether a satisfactory solution could [have been] reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective bargaining." *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, *supra.*

While mindful of the scope and deference that must properly be accorded to management's prerogative to make business decisions, we do not believe that the Supreme Court's decision in *Darlington* was intended to affect the application of the aforestated "national labor policy" in circumstances like those in the instant case. Accordingly, we adhere to our prior decision.

REMEDY

The unfair labor practices found herein involve the unilateral close-down of Respondent's Bleeker Street plant without giving the Union notice or opportunity to discuss the matter. In our original decision we determined that, in order to effectuate the policies of the Act, it was necessary to order Respondent to make the employees of the Bleeker Street plant whole for loss of pay suffered by reason of the unfair labor practices by paying each of them a sum of money equal to the amount he would have earned as wages from the date of his termination of employment between the dates of April 30, 1963, and July 1, 1963, to the time he secured equivalent employment elsewhere, but, in no event, past the date of December 4, 1963, the date Respondent was required to vacate the Bleeker Street premises under its agreements concerning the sale of such premises. We are now persuaded that Respondent's back-pay liability properly terminates as of the date it finally went out of business by closing down the Sussex Avenue plant on August 31, 1963. As previously indicated, there is no charge or allegation that such closing was accompanied by failure to satisfy statutory obligations. In these circumstances, we deem it appropriate to limit Respondent's backpay liability to the date of August 31, 1963, and amend the cease-and-desist provisions of our Order so as to make them apply only in the event Respondent resumes operations.

ORDER

IT IS HEREBY ORDERED that the order previously issued in this case be, and it hereby is, amended in the following manner:

Paragraphs 1(a) and 1(b) are amended by inserting the words "In the event Respondent resumes business operations," at the beginning of the paragraphs, and by reducing the existing upper case letters beginning those paragraphs to lower case.

Paragraph 2(f) is amended by changing the period appearing at the end of the paragraph to a comma, and by adding the words "as modified by the section entitled 'Remedy' of the Board's Supplemental Decision and Order Amending Order Amending Order."

The paragraph of the Notice which contains reference to the date of "December 4, 1963" is amended by striking that date and substituting the date "August 31, 1963."

MEMBER JENKINS, concurring in part:

I have grave doubts about the correctness of my colleagues' position that the Supreme Court's decision in *Textile Workers Union of America* v. *Darlington Manufacturing Company*, 380 U.S. 263, is not applicable to cases involving alleged violations of Section 8(a)(5) for closing a plant without prior bargaining. However, I need not reach that issue here. I stated in my original opinion in this case that I agreed that Respondent violated Section 8(a)(5), but rested that decision on the clearly established fact that the bargaining it engaged in leading to the last contract with the Union was sham bargaining and not undertaken in good faith. I reaffirm that opinion here, including the remedy I there proposed.

United States Gypsum Company *and* International Union of Electrical Radio & Machine Workers, AFL–CIO, Petitioner. *Case No. 8–RC–5571. May 14, 1965*

ORDER AMENDING CERTIFICATION

Following a Board-directed election conducted on November 6, 1964, the Petitioner was certified as the exclusive bargaining representative of "all production and maintenance employees at the Employer's Warren, Ohio, plant, on Phoenix Road, including the sample department operator, storekeeper, all shipping department operators, the packing department operator, and all production department operators, but excluding all office clerical employees, guards, professional employees, the works manager, superintendents, foremen, head machinist, head mechanic, and all other supervisors as defined in the Act."

On November 13, 1964, the Petitioner filed with the Board a motion to amend and clairfy the unit so as to include four employees, classified as "firemen-watchmen." The Employer, on November 23, 1964, filed a separate motion to amend and clarify so as to exclude the firemen-watchmen from the unit on the ground that they are guards within the meaning of the Act. The Board having considered the motions and having decided that they raised substantial and material issues of fact,