

WE WILL NOT in any 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 the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL bargain collectively, upon request, with International Typographical Union, as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All of our production and maintenance employees at our Sylacauga plant, including pressroom employees, stereotype and plating room employees and mailing room (shipping) employees, but excluding all office clerical employees, professional and technical employees, janitors, guards, and supervisors as defined in the National Labor Relations Act.

All our employees are free to become, remain, or refrain from becoming members of the above-named Union or any other labor organization

DIXIE COLOR PRINTING CORP.,
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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 528 Peachtree-Seventh Building, 50 Seventh Street NE., Atlanta, Georgia, Telephone No. 526-5741.

**Acme Markets, Inc. and Retail Store Employees Union, Local 692,
RCIA, AFL-CIO.** *Case No. 5-CA-2819. February 14, 1966*

DECISION AND ORDER

Upon charges duly filed by Retail Store Employees Union, Local 692, RCIA, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint dated October 21, 1964, against Acme Markets, Inc., herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Sections 8(a)(1) and (3) and 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of a hearing before a Trial Examiner were duly served upon the Respondent and the Union. On November 2, 1964, the Respondent filed its answer admitting certain allegations of the complaint, but denying the commission of any unfair labor practices. Thereafter, on January 13, 1965, the parties agreed to submit the case to the Board for decision on a complete stipulation of facts which expressly waived a hearing before a Trial Examiner and a Trial Examiner's recommended findings of fact, conclusions of law, and order. The Board having authorized such submission of the case and

having received and considered briefs filed by the General Counsel, the Respondent and the Union hereby finds the facts to be as stipulated.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, Acme Markets, Inc., is engaged in various States, including Maryland, Delaware, and Pennsylvania, in the selling of food and related products in retail stores. In the conduct of its business operations in Maryland and Delaware during the last 12 months, a representative period, the Respondent grossed in excess of \$2 million. In the same period, the Respondent purchased goods valued in excess of \$100,000 from outside the States of Maryland and Delaware, which goods were eventually delivered to its stores located in those States. The Respondent admits, and we find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

The parties agree and we find that Retail Store Employees Union, Local 692, RCIA, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Respondent is a member of the Baltimore Food Employers' Labor Relations Association, herein called FELRA, a multiemployer bargaining association which bargains on behalf of a number of retail grocery chains with the Union. Other members of the Association are The A & P Tea Company, Food Fair Stores, Giant Food, Grand Union, Penn Fruit Company, and Safeway Stores, Inc. The first contract between the FELRA and the Union was executed in 1961 and expired on January 25, 1964. The bargaining unit covered by this contract included grocery employees in all of the stores operated by members of FELRA in the vicinity of Baltimore. In addition, the unit includes grocery employees in stores of various members of the FELRA in other communities in Maryland, Delaware, and Virginia. The Respondent operates, in addition to its Baltimore stores, approximately 51 stores located on the Eastern Shore of Delaware, Maryland, and Virginia. Except for two stores in Newark, Delaware, the employees in these stores are unrepresented although the stores are part of the same administrative division of the Respondent as its stores in Baltimore and vicinity which are covered by FELRA bargaining. In 28 of the 51 locations on the Eastern Shore, the Respond-

ent operates a nonunion store outside the FELRA bargaining unit in close proximity to a store operated by a member of FELRA which is covered by multiemployer collective bargaining.

On January 7, 1964, FELRA and the Union began negotiations for a new contract to replace the contract which was scheduled to expire on January 25, 1964. Bargaining continued for a period of 3 months but no agreement was reached. On April 17, 1964, the Union called a strike against all of the Respondent's unit stores. No strike was called against the unit stores of the other FELRA members. The members of FELRA had an agreement that if such a situation should occur, all of the other FELRA members would close down their stores which were covered by the multiemployer bargaining unit in a defensive lockout. Other members of FELRA thereupon closed down their unit stores pursuant to this agreement.

The effect of such a defensive lockout, however, would have been to leave 28 of Respondent's Eastern Shore stores open and operating in communities where other members of FELRA had closed down bargaining unit stores in accordance with the above agreement. In the Respondent's judgment, this situation imperiled the multiemployer bargaining unit and represented an obstacle to the carrying out of the defensive lockout agreement. Accordingly, the Respondent shut down its nonunit stores in the 28 locations on the Eastern Shore in which stores of other members of FELRA would be shut down in accordance with the agreement. This action by Respondent was not required by any specific terms of the FELRA agreement but was taken by the Respondent as the result of its conclusion, based on its judgment of the situation, that such action was necessary to insure the carrying out of the FELRA defensive lockout agreement and to preserve the FELRA multiemployer bargaining unit. The following sign was posted in the window of each of the 28 closed stores:

Sorry, store forced to close. This store is temporarily closed because of circumstances beyond our control. We regret any inconvenience. Acme Markets, Inc.

In a number of stores, an additional notice was posted indicating the location of the nearest open Acme Store.

At the same time that these stores were shut down, the Respondent decided that none of the employees in the 28 stores would lose any pay or be disadvantaged in any way because of the shutdown. Accordingly, employees in the Eastern Shore stores, whenever possible, were given inventory or other such work in their own stores or work in other stores which remained open. In some instances, employees had to travel distances greater than they normally would travel in order to go to work, and in other instances, they traveled shorter distances than normal. In cases where there was not sufficient work available

to afford to employees their usual income, the Respondent made up the difference. During the first several weeks of the strike, however, a number of nonunit Eastern Shore employees experienced delays in receiving their normal pay checks and an undetermined number of these employees received less pay than they normally would have received had their stores not been shut. When this situation was brought to the attention of the Respondent's management, however, the matter was corrected, and all employees whose stores were shut have since been made whole in accordance with Respondent's policy.

On June 24, 1964, the six members of FELRA other than Respondent reopened all their stores and the Respondent reopened the 28 stores which it had closed on the Eastern Shore. All employees of these stores were returned to their original jobs, wages, hours, and working conditions and the stores have operated normally since that time.

A. Issue

The parties agree that the lockout of unit employees by nonstruck members of FELRA was a lawful multiemployer defensive lockout under *Buffalo Linen Supply Company*.¹ The question in this proceeding is whether the Respondent violated Section 8(a)(1) and (3) of the Act by locking out employees in its 28 Eastern Shore stores which were not included in the multiemployer bargaining unit involved in the labor dispute with the Union.

B. Contentions of the parties

The General Counsel argues that Respondent's lockout of employees in its nonunit Eastern Shore stores violated 8(a)(1) in that it interfered with the Section 7 rights of Eastern Shore employees to refrain from collective bargaining and other concerted activities; and that it violated 8(a)(3) and (1) in that Respondent discriminated in the terms and conditions of employment of these nonunit employees in order to discourage unit employees from engaging in collective bargaining and from participating in strike activity. The General Counsel further contends that *Buffalo Linen*, which involved only unit employees, is inapposite because the Respondent here locked out *nonunit* employees. The Respondent, on the other hand, relies particularly on the Supreme Court decision in *American Ship Building*² and argues that there is no evidence of unlawful motivation to support a finding that the lockout violated Section 8(a)(1) and (3) of the Act. The Respondent further contends that its action was a permissible multiemployer lockout under *Buffalo Linen*.

¹ *N.L.R.B. v. Truck Drivers, Local Union No. 449, International Brotherhood of Teamsters, etc.*, 353 U.S. 87, affg., 109 NLRB 447.

² *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300.

C. Conclusions

We begin our analysis of the issues in this case by noting that the parties concede that the lockout of unit employees by the nonstruck members of FELRA was intended to preserve the integrity of the multiemployer unit and was therefore lawful under *Buffalo Linen*. Further, the parties here stipulated that the Respondent's lockout of its Eastern Shore employees, the action whose lawfulness is in issue here, was taken "as a result of Acme's conclusion based upon its judgment of the situation that the action was necessary to insure the carrying out of the FELRA defensive lockout agreement and to preserve the FELRA multiemployer bargaining unit." Plainly, then, the purpose of the Respondent's lockout of the Eastern Shore employees was not "to injure a labor organization or to evade its duty to bargain collectively."³

The General Counsel argues, however, that the lockout here did not serve to protect the multiemployer bargaining unit because, unlike the situation in *Buffalo Linen*, where employees in the multiemployer unit were locked out, here the Respondent locked out nonunit employees. We do not agree. In the particular circumstances of this case, we are satisfied that even though the locked-out employees were not in the unit, their lockout *did* serve to protect the integrity of the multiemployer unit. The Supreme Court's decision in *Brown Food*⁴ provides an analogy. In *Brown Food*, the nonstruck employers locked out unit employees and hired temporary replacements for these employees. The Board, while finding that the initial lockout by the nonstruck employers was lawful, held that by hiring temporary replacements, these employers went beyond their right to protect the integrity of the multiemployer unit and therefore violated the Act. In reversing the Board and finding the employer's entire course of conduct lawful, the Supreme Court reasoned that since the struck employer chose to operate with replacements, if the other employers were not permitted to operate with replacements, the economic advantage would pass to the struck employer, the nonstruck employer would be deterred in exercising the defensive lockout, and the whipsaw strike would enjoy "an almost inescapable prospect of success." These considerations are equally applicable in the instant case. Here, nonstruck members of FELRA closed their unit stores to preserve the integrity of the multiemployer unit. However, in 28 cities, the Respondent operated nonunit stores which would have remained open while unit stores, operated by other members of FELRA, remained closed by virtue of the multiemployer defensive lockout. So, if the

³ *American Ship Building Co. v. N.L.R.B.*, *supra*, 308.

⁴ *N.L.R.B. v. Brown, et al.*, *d/b/a Brown Food Store*, 380 U.S. 278.

Respondent were not permitted to close its stores in these 28 cities, the economic advantage would have passed to the Respondent, the non-struck employers would have been deterred from closing their stores as part of the multiemployer defensive lockout and, as in *Brown Food*, the whipsaw strike would have enjoyed an almost inescapable prospect of success. We think it immaterial that in *Brown Food* the disputed conduct was the hiring of temporary replacements by the nonstruck employers while here it is the action of the struck employer in laying off nonunit employees which is alleged to be unlawful, since in both cases the conduct was designed to equalize the economic position of the struck and nonstruck employers in the face of the whipsaw strike and thus to serve the legitimate business end of preserving the integrity of the multiemployer unit:

Notwithstanding these facts, which, as we have shown, establish that the lockout here was intended to serve a legitimate business interest of the Respondent, the General Counsel contends that the lockout was unlawful because it trenched upon the Section 7 rights of Eastern Shore employees in violation of 8(a)(1). More specifically, the General Counsel argues that the lockout propelled nonunit employees into a dispute not their own and thus necessarily forced them into engaging in concerted activity, thereby interfering with the Section 7 rights to refrain from engaging in concerted activity. We reject this reasoning. It seems clear to us that employees who are locked out from their jobs are not being compelled to engage in concerted activity of any sort. Moreover, even apart from that consideration, we note that the General Counsel has adduced no evidence to establish that this asserted motive was in fact the reason impelling the lockout of nonunit employees. On the contrary, as we have already stated, we are satisfied that the lockout was designed to serve the legitimate business end of preserving the integrity of the multiemployer unit.

Finally, we think it relevant that the Respondent, although locking out nonunit employees, made certain that, to the extent possible, they would suffer no financial or other detriment because of the lockout. It is true, as the General Counsel points out, that where there is discriminatory activity, the existence of loss of employment or wages is not necessarily determinative of whether an unfair labor practice has been committed. But where, as here, the question is whether the employer's conduct was improperly motivated, we believe that action taken by the employer to ensure that his employees would suffer no loss is strong evidence that his motive was not to coerce employees in the exercise of their Section 7 rights.

The General Counsel further contends that the lockout interfered with, restrained, and coerced Baltimore unit employees and discouraged them from engaging in union activity in violation of Section

8(a)(3) and (1) of the Act. It is apparently his theory that since the lockout of nonunit employees admittedly was calculated to assist other employer-members of FELRA to implement their defensive lockout, the lockout of such nonunit employees had the natural and foreseeable effect of discouraging striking unit employees from continuing to engage in their lawful strike and of discouraging non-striking unit employees from engaging in future strikes.

We likewise reject this argument. The record contains neither specific evidence that the purpose of the lockout of nonunit employees was to discourage unit employees from engaging in union activity nor general evidence of union animus by the Respondent. Indeed, we have emphasized that the lockout of nonunit employees was concededly designed to aid employer-members of FELRA in attempting to protect the integrity of the multiemployer unit. In these circumstances, and since under *Buffalo Linen* the lockout of unit employees may not be found to have had an unlawful purpose, it is difficult to discern a basis for finding that the lockout of nonunit employees, aimed at achieving the same purpose as the unit lockout, was unlawfully motivated vis-a-vis the unit employees.

In sum, as the lockout here was designed to serve the legitimate business end of protecting the integrity of the multiemployer unit, we do not view the Respondent's conduct here complained of as "demonstrably so destructive of employee rights"⁵ or "inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other anti-union animus is required."⁶ And as the record here contains no such specific evidence of hostile motivation or discriminatory intent, we conclude that the Respondent has not violated Section 8(a)(1) and (3) of the Act. Accordingly, we shall dismiss the complaint in its entirety.⁷

[The Board dismissed the complaint.]

⁵ *N.L.R.B. v. Brown*, *supra*, 286.

⁶ *American Ship Building v. N.L.R.B.*, *supra*, 311.

⁷ On April 26, 1965, the Union filed a motion requesting the Board to reopen the record and remand the case to a Trial Examiner for the purpose of taking additional testimony in view of the Supreme Court's decision in *Brown Food*, which issued after the parties entered into the stipulation of facts herein. The General Counsel joined in this motion and the Respondent filed an opposition thereto. On June 3, 1965, the Board informed the parties that it would not rule on the motion to reopen and remand until the parties had had an opportunity to file briefs on the merits. We have carefully examined the various items of evidence which the Union proposes to present at a reopened hearing and we conclude that a number of these items are irrelevant to the issue in this case and that, as to the remaining items, the Union has not made sufficiently specific offers of proof respecting the evidence it proposes to introduce, and in any event the stipulation of the parties is sufficient to pass on the issues presented. The motion is accordingly denied.

MEMBER BROWN, concurring:

The Employer's closing of stores to the public while continuing to pay employees' wages in these stores does not, in my opinion, constitute a lockout in the present circumstances. I therefore agree with my colleagues that there was no meaningful discrimination against the nonunit employees, and for that reason I join in dismissing the complaint.

Universal Manufacturing Corporation of Mississippi and International Brotherhood of Electrical Workers, AFL-CIO-CLC, Petitioner. *Case No. 15-RC-3061. February 14, 1966*

DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION

Pursuant to the provisions of a Stipulation for Certification upon Consent Election, approved March 25, 1965, an election by secret ballot was conducted April 23, 1965, under the direction and supervision of the Regional Director for Region 15 in the unit which had been found appropriate to determine whether the employees therein desired to be represented by the Petitioner for purposes of collective bargaining. Upon the conclusion of the balloting, the parties were furnished with a tally of ballots showing that 567 of approximately 578 eligible voters cast ballots, of which 272 were for, and 287 were against, the Petitioner, and 8 ballots were challenged. The number of challenged ballots was insufficient to affect the election results. Thereafter, Petitioner filed timely objections to conduct affecting the results of the election.

After an investigation, the Regional Director issued his Report on Objections on August 6, 1965, in which he recommended that the objections be overruled in their entirety. Petitioner then filed timely exceptions to the Regional Director's Report.

Upon the entire record in this case, the National Labor Relations Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

156 NLRB No. 132.