

including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by other material.

(b) Notify the Regional Director for Region 10, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent has taken to comply herewith.²

² In the event that this Recommended Order is 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 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 our employees that:

WE WILL NOT unlawfully interrogate our employees or threaten them with economic reprisals or promise them economic benefits for the purpose of influencing their union activities or sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist United Packinghouse, Food & Allied Workers, AFL-CIO, or any other 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.

All our employees are free to become or remain or to refrain from becoming or remaining members of United Packinghouse, Food & Allied Workers, AFL-CIO, or any other labor organization.

GALBREATH BAKERY, INC.
(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, N.E., Atlanta, Georgia 30323, Telephone 526-5741.

**A. C. Rochat Company and E. R. Beeler,
Director of Organization, Region III, Sheet
Metal Workers International Association,
AFL-CIO. Case 10-CA-5676.**

March 15, 1967

SUPPLEMENTAL DECISION AND AMENDED ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS BROWN,
JENKINS, AND ZAGORIA

On January 29, 1965, the National Labor Relations Board issued its Decision and Order in this case,¹ in which it found that Respondent had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. The Board found that the Respondent, who was engaged in the sale, installation, and maintenance of air conditioning, heating, and refrigerating equipment, had initially discharged or laid off 5 employees because of their union activities; and had subsequently abandoned part of its business, laying off 17 other employees, because of its refusal to recognize and bargain collectively with the Union. The Board ordered Respondent to make whole the employees who were discriminatorily discharged or laid off by paying to each the amount he would have earned from the time of discharge or layoff until such time as each secured substantially equivalent employment with another employer or with Respondent in the event it resumed its former operations. The Board also ordered Respondent to reinstate all the employees who were discharged or laid off in the event it resumed operations, and to create a preferential hiring list and notify the employees on that list that in the event it resumed operations, it would reinstate all those employees who were discriminatorily discharged or laid off.

On October 11, 1966, the Board issued a notice to show cause in this proceeding requesting the parties to show cause why, in the light of the Supreme Court's decision in *N.L.R.B. v. Darlington Manufacturing Co.*,² the Board's Order should not be modified to find that the Respondent did not violate the Act by discontinuing part of its business and laying off the 17 employees. The Board noted that in *Darlington* the Court pointed out that it was not an unfair labor practice for an employer to shut down part of its business permanently for antiunion reasons unless the partial closing was motivated by a purpose to "chill unionism" in any of the remaining parts of its business.

Thereafter the Respondent and the Charging Party filed responses to the show cause order. The

¹ 150 NLRB 1402.

² 380 U.S. 263.

Charging Party takes the position that the *Darlington* decision is not in conflict with the Board's decision since the Respondent's motive was to chill unionism³ and that the Board's decision should not be changed. The Respondent contends that because its president, A. C. Rochat, was motivated by his religious beliefs in refusing to bargain with the Union and in closing down the sheet metal operations, the Board should vacate its order. In any event, the Respondent contends that *Darlington* is controlling to the extent that the permanent closing down of its sheet metal operations and laying off the 17 employees was not in violation of the Act. We find merit in the Respondent's position to the extent herein indicated.

Initially we state that we adhere to that portion of our earlier findings, adopting thereby the Trial Examiner's findings, that the Respondent violated Section 8(a)(1) of the Act by interrogating its employees concerning their union activities and by threatening them with loss of employment if the Union won the election. We also adhere to our finding that the Respondent violated Section 8(a)(3) of the Act by discharging Gene Bruce, Louie Mills, Ralph Cox, Bobby Dukes, and C. D. Chandler; and violated Section 8(a)(5) by its general refusal to meet and bargain with the Union as the statutory representative of its employees after the Union's certification. The evidence in the record makes clear, and we are offered no proof to the contrary, that the Respondent's conduct on which these violations are based was motivated by antiunion considerations and that such conduct occurred before any decision was taken by the Respondent to terminate its sheet metal operations.

The Supreme Court's decision in *Darlington*, however, compels a different conclusion as to the Respondent's liability for the layoff of the 17 employees upon the closing down of its sheet metal operations. In *Darlington* the Supreme Court stated that it is not an unfair labor practice for an employer to shut down part of its business permanently for antiunion reasons, unless the partial closing is "motivated by a purpose to chill unionism in any of the remaining [parts of business]" explaining:

If the persons exercising control over a plant that is being closed for anti-union reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a

result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out. *Id.*, 275.

The closing down of the Respondent's sheet metal operations was, of course, triggered by union considerations, but we cannot find on the evidence before us that the purpose was to "chill" unionism in the remaining part of its business. For one thing there is no affirmative evidence that such was the intention of A. C. Rochat, who guided the destinies of the Respondent. Respondent's activities other than its sheet metal operations were in the sale of air-conditioning and refrigeration equipment. Respondent's sales force consisted of Respondent's sales manager, John Rochat, a brother of A. C. Rochat, and one salesman. While its installation services were unquestionably important to its sales activities, and vice versa, we have no evidence as to the relative profitability of these two activities. Not only is it reasonable to infer that the elimination of the installation services could, without more, serve to affect the volume of sales, but the evidence shows that, after the closing down of its sheet metal operations, Respondent voluntarily restricted its sales to transactions that would not require installation by Respondent and so instructed its salesman.⁴ In such circumstances we cannot infer that Respondent disposed of a substantial part of its business involving the layoff of 22 employees because it believed that by doing so it would discourage the unionization of a salesman and a bookkeeper and that it would reap a substantial economic benefit from such discouragement. Moreover, there is no evidence that the Union, or any other labor organization, was in any way interested in conducting an organizing campaign among the two remaining employees, so as to have made their organization a prime concern of the Respondent, and, indeed, the Union appears to concede that the two employees were not, in fact, amenable to unionization. For the foregoing reasons we conclude that Respondent's purpose in closing down its sheet metal operations was not to "chill" unionism among its remaining employees, and that termination of these operations was not, therefore, in violation of Section 8(a)(3) of the Act.

As to the Respondent's conduct in closing down its sheet metal operations and disposing of its assets without informing or consulting with the Union, the Trial Examiner found, and we agreed, that it

³ The Charging Party argues that where an employer so reduces the size and changes the method of operation to a degree that the remaining portion is not amenable to unionization, his purpose has been to defeat the union in the remaining portion

⁴ Such evidence as we have in the record suggests that a sale of equipment was more likely to be effectuated if it carried with it an obligation to install

constituted a violation of Section 8(a)(5) of the Act. We still hold to the principle as we recently stated in *Ozark Trailers, Incorporated*,⁵ that an employer who decides to terminate a portion of its business has an obligation to "engage in a full and frank discussion with the collective-bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees." But, on reexamination of the record, we are persuaded that this aspect of Respondent's conduct does not merit a finding of an 8(a)(5) violation even though we regard the Respondent's action in terminating his sheet metal operations as only a partial closing as defined by the Supreme Court in its *Darlington* decision.

In that connection the evidence shows that the Union was informed by Respondent's attorney shortly after the election that Respondent would never sign a contract with the Union because of A. C. Rochat's religious convictions, and that Respondent would rather sell the business. It is not disputed that Respondent made bona fide efforts to dispose of its business, which, if successful, would have permitted its continuation as a going concern and the preservation of the Union's interest. In fact, the Union offered to help Respondent find a buyer, and even succeeded in referring one prospective buyer. Unfortunately, all attempts to consummate a sale of the business ended in failure. It was only then that Respondent made its decision to dispose of its machines and equipment by sale and auction.

We are not enlightened on how, in the foregoing circumstances, the Respondent and the Union could have engaged in effective bargaining before Respondent made the irreversible decision and disposed of its assets. The problem was not an economic one, and we cannot see wherein A. C. Rochat's religious convictions, which were at the heart of the Union's difficulty with Respondent, could be an apt subject for collective bargaining in this matter. We are of the opinion now, and so find upon consideration of all the circumstances of this case, that the Respondent did not violate Section 8(a)(5) of the Act in connection with the sale and disposition of its assets.

The conclusions we have reached here dictate, in light of the Court's decision in *Darlington*, an altered remedy. As we have indicated, the permanent closing of the sheet metal operations terminated Respondent's liability after March 6, 1964, the date on which it first disposed of a substantial part of its physical assets. Thus there can be no backpay for the 17 employees laid off at that time. However, it does not affect Respondent's liability for the discriminatory discharge of the five named employees, and with respect to them we shall order

the Respondent to make them whole for any loss of pay they may have suffered by reason of the discrimination against them. Their backpay, however, shall be for the period from the date or dates of their respective discriminations to March 6, 1964, the date on which the Respondent terminated its sheet metal operations, and beyond which there is to be no liability for backpay. Furthermore, we are also of the opinion that it will effectuate the policies of the Act to order the Respondent to cease and desist from engaging in conduct herein found to be in violation of the Act.

Our decision herein is based on a finding that Respondent has permanently terminated its sheet metal operations. On the chance that Respondent may, under circumstances that we cannot foresee, resume such operations, we shall, in order to meet such contingencies, retain jurisdiction herein so that we may then reconsider the implications of such action on Respondent's part.

AMENDED ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, A. C. Rochat Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Sheet Metal Workers International Association, AFL-CIO, or any other labor organization, as the exclusive representative of any of its employees at Respondent's Knoxville, Tennessee, plant, in an appropriate unit.

(b) Discouraging membership in the above-named or any other labor organization of its employees by discharging or laying off any of its employees because of their union activities or otherwise discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(c) Threatening employees to discontinue any operations or departments or to discharge any of them or to take other reprisals because of membership in, or activities on behalf of, the above-named or any other labor organization.

(d) Interrogating employees concerning their activities in behalf of the above-named Union, or any other labor organization, in a manner constituting interference, restraint, or coercion in violation of the Act.

(e) Threatening employees that it will not bargain with the above-named Union, or any other labor organization, notwithstanding the fact that said Union is certified by the National Labor Relations Board as the representative of the Respondent's employees.

(f) Creating the impression that its employees are under surveillance in their union activities in a manner constituting interference, restraint, and coercion in violation of the Act.

(g) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist Sheet Metal Workers International Association, AFL-CIO, or any other 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, and to refrain from any or all such activities.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole C. D. Chandler, Gene Bruce, Louie Mills, Ralph Cox, and Bobby Dukes, who were discriminatorily discharged, for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy," as modified by our supplemental decision herein.

(b) Post at its offices and plant at Knoxville, Tennessee, copies of the attached amended notice marked "Appendix A."⁶ Copies of said notice, to be furnished by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material. Inasmuch as the posting of a notice in a plant with drastically reduced operations would be inadequate to inform all of the affected parties, the Respondent shall also mail an exact copy of the amended notice to the Union and to each of the employees listed in the attached "Appendix A." Copies of said notice, also to be furnished by the Regional Director for Region 10, shall, after being signed by Respondent's representative, be mailed immediately after receipt thereof.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for determination of the amount of backpay due under the terms of this Amended Order.

(d) Notify the Regional Director for Region 10, in writing, within 10 days from the date of this Amended Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the Board reserves to itself the right to reconsider and modify the provisions of this Amended Order, if made necessary by circumstances not now apparent.

⁶ In the event that this Amended Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Supplemental Decision and Amended Order" the words "a Decree of the United States Court of Appeals, Enforcing an Amended Order."

APPENDIX A

AMENDED NOTICE TO ALL EMPLOYEES

Pursuant to a Supplemental Decision and Amended Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with Sheet Metal Workers International Association, AFL-CIO, or any other labor organization, as the exclusive representative of our employees in an appropriate unit.

WE WILL NOT discourage membership in the above-named, or any other labor organization of our employees, by discharging or laying off any of our employees, or otherwise discriminate in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT threaten to discontinue our business or to discharge any of our employees or to take other reprisals against them because of their membership in, or activities on behalf of, any labor organization.

WE WILL NOT interrogate our employees concerning their union activities in a manner constituting interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

WE WILL NOT threaten our employees that we will not bargain with any labor organization notwithstanding the fact that it is certified by the National Labor Relations Board as the representative of our employees.

WE WILL NOT create among our employees the impression that they are under surveillance in their union activities in a manner constituting interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist Sheet Metal Workers International Association, AFL-CIO, or any other 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, and to refrain from any or all such activities.

WE WILL make whole C. D. Chandler, Gene Bruce, Louie Mills, Ralph Cox, and Bobby Dukes for the discrimination practiced against them.

A. C. ROCHAT
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.

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, Atlanta, Georgia 30323, Telephone 526-5741.

Northwest Smorgasbord, Inc.¹ Employer and Local Joint Executive Board of Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, Petitioner.
Case 19-RC-4060.

March 15, 1967

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN McCULLOCH AND MEMBERS FANNING AND ZAGORIA

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Sam T. Kabanuck, Hearing Officer. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer and the Petitioner have filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the

National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer, which contests the Board's assertion of jurisdiction, has been engaged since November 1, 1966, in the operation of a restaurant in Seattle, Washington. The Employer's receipts for the first month of operation totaled over \$46,496.² Projecting this figure on an annual basis indicates that the Employer's volume of business will total over \$500,000 a year, and, therefore, that the Employer's operation meets the Board's jurisdictional standard for retail enterprises.³

The Employer contended at the hearing (1) that the Board lacks jurisdiction because the restaurant has been in operation for so short a time, and (2) that the restaurant business generally declines after the initial period of operation. We find no merit in these contentions. As to (1) the Board, in administering its jurisdictional standards, customarily projects available revenue figures with respect to a business in operation for less than a year.⁴ As to (2) this contention is conjectural. Accordingly, we find that the Employer is engaged in commerce, and that it will effectuate the policies of the Act to assert jurisdiction.⁵

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All production and maintenance employees employed by the Employer at 85th and 1st Avenue N. W., Seattle, Washington, excluding all office clerical employees, guards, and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]

¹ The Employer's name appears as amended at the hearing

² This figure does not include the State sales tax of 4.2 percent.

³ *Carolina Supplies and Cement Co.*, 122 NLRB 88.

⁴ *Intergraphic Corporation of America*, 160 NLRB 100; *City Line Open Hearth, Inc.*, 141 NLRB 799; *Wallace Shops, Inc.*, 133 NLRB 36; *Sequim Lumber and Supply Company*, 123 NLRB 1097; *Miller Container Corporation*, 115 NLRB 509

Attached to the brief filed by the Employer is a request that the Board consider additional data based on the Employer's operations since the hearing or, alternatively, that the Board reopen the record for the presentation of such data. To consider post hearing business fluctuations, however, is contrary to the

basic considerations underlying the Board's projection policy. As we are satisfied that the Employer's operations on a projected basis meet the Board's jurisdictional standards, we see no reason for deferring the right of the Employer's employees to avail themselves of the processes of the Act. The proffer of additional data is therefore rejected, and the motion to reopen the record is hereby denied.

⁵ In view of this determination, we find it unnecessary to consider the Petitioner's alternative contention that the Employer and the corporation under whose franchise it operates constitute a single employer.