

American Bread Company and Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union 327, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and American Bakery and Confectionery Workers' International Union, AFL-CIO. Case 26-CA-2386

March 7, 1968

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, JENKINS, AND
ZAGORIA

On November 21, 1966, Trial Examiner Thomas F. Maher issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, 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 and the Intervenor filed exceptions to the Trial Examiner's Decision and supporting briefs.

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, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings,¹ conclusions, and recommendations of the Trial Examiner.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby

¹ We agree with the Trial Examiner that the Respondent violated Section 8(a)(1) and (2) of the Act by recognizing and bargaining with the Intervenor during the pendency of a real question concerning representation *Midwest Piping & Supply Co., Inc.*, 63 NLRB 1060. The record clearly shows that the Respondent had full knowledge of Local 327's active and continuing organizational campaign when it recognized the Intervenor; that Local 327's claim was not a bare claim, but was supported by signed authorization cards, that the Respondent engaged in disparate treatment of the two unions involved herein, and, that Local 327 was continuing to pursue before the Board its claim that the expedited election was invalid because of the Regional Director's unit determination, a matter which was litigated in the proceedings involving Cases 26-CC-94 and 26-CP-19. On this basis, we find that a substantial question concerning representation existed notwithstanding Local 327's strength of 1 authorization card out of a unit of 92 when Local 327 demanded recognition and a total of 8 cards when the Respondent recognized the Intervenor.

² In view of our unit determination this day in Cases 26-CC-94 and 26-CP-19, 170 NLRB 91, we do not find it necessary to adopt either of the alternate bargaining units found appropriate by the Trial Examiner.

orders that the Respondent, American Bread Company, Nashville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.³

³ Delete from paragraph 2(a) of the Trial Examiner's Recommended Order that part thereof which reads "to be furnished" and substitute therefor "on forms provided." Also delete from paragraph 1(a) and the relevant part of the Notice, the phrase "or any other labor organization."

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

THOMAS F. MAHER, Trial Examiner: Upon a charge and an amendment thereto filed on April 18 and May 31, 1966, respectively, by Teamsters, Chauffeurs, Helpers and Taxi Cab Drivers, Local Union 327, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Teamsters, the Regional Director for Region 26 of the National Labor Relations Board, herein called the Board, issued a complaint on behalf of the General Counsel of the Board on June 2, 1966, against American Bread Company, Respondent herein, alleging violations of Section 8(a)(1) and (2) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, *et seq.*), herein called the Act. In its duly filed answer Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practice.

Pursuant to notice a hearing was held before me in Nashville, Tennessee, where the parties were represented by counsel and afforded full opportunity to be heard to present oral argument, and to file briefs. Briefs were filed by all parties on August 10, 1966.

Upon consideration of the entire record, including the briefs, and upon my observation of witnesses appearing before me, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE BUSINESS OF THE RESPONDENT

American Bread Company, Respondent herein, is a Tennessee corporation with its principal office and place of business in Nashville, Tennessee, where it is engaged in the baking, sale, and distribution of bread and other bakery products. During the 12-month period immediately preceding the issuance of the complaint herein American Bread Company, in the operation of its business, received goods and materials from points directly outside the State of Tennessee valued in excess of \$50,000, and during the same period of time shipped goods valued in excess of \$50,000 from its Nashville, Tennessee, plant, directly to points located outside the State of Tennessee. Upon the foregoing I conclude and find that Respondent is an employer engaged in commerce and in operations affecting commerce

within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Teamsters, Chauffeurs, Helpers and Taxi Cab Drivers, Local Union 327, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and American Bakery and Confectionery Workers' International Union, AFL-CIO, herein called the Bakery Workers, are now and have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act.

III. THE ISSUE

The effect of the Teamsters demand for recognition upon the subsequent recognition of the Bakery Workers and the execution of a collective agreement with it.

IV. THE UNFAIR LABOR PRACTICE

A. Background

The parties in this proceeding are not strangers to the Board's processes. In April 1965 the Teamsters demanded recognition as majority representative of a unit of Respondent's production, maintenance, and sales driver employees. Upon Respondent's refusal to grant recognition to the Teamsters its employees, on April 19, went on strike in protest. Whereupon, on April 23, 1965, Respondent filed with the Board its petition in Case 26-RM-182 for an expedited election among the employees affected, namely "all route salesmen, transport drivers, production and maintenance employees employed by American Bread Company" at its Nashville plant, with the customary exclusion of clerical, supervisory, and guard personnel.¹ The election was conducted thereafter on May 28. Of the 284 eligible voters 244 actually voted, of whom 131, a majority, voted against the participating union, the Teamsters. These results were eventually certified by the Regional Director on July 30, 1965, after the resolution of a number of challenges and objections. Notwithstanding its rejection by the employees in the unit in which it sought to represent them the Teamsters continued its strike for recognition against Respondent until August 5, 1965. Respondent meanwhile filed charges in Cases 26-CC-94 and 26-CP-19 against the Teamsters alleging violation of Sections 8(b)(4)(A) and (B) and 8(b)(7)(B) of the Act. A complaint was

thereafter issued. On December 7, 1965, a hearing in the matter was held before Trial Examiner Arthur E. Reyman, and on February 26, 1966, he issued his Decision in which he found that the Teamsters picketing constituted a violation of the Act, as alleged, and recommended that a cease-and-desist order be issued directed to the Teamsters misconduct (but see fn. 1, *supra*). Meanwhile there appears to have been a series of charges filed with the Regional Director by both the Company and the Teamsters, each directed at the alleged misconduct of the other. These were Cases 26-CA-2092 and 26-CP-18. These appear to have been administratively disposed of and all that remains are the charges, complaints, and findings directed against the Teamsters in the outstanding Cases 26-CC-94 and 26-CP-19, and the issues raised by the charge of the Teamsters against the Company herein.

B. The Teamsters Latest Demand

After all of the foregoing had transpired the Teamsters renewed its efforts to represent Respondent's employees. Whereas it sought in April 1965 to represent "route salesmen and production, maintenance, shipping and receiving [all inside employees]," with the customary exclusions, its demands a year later, in March 1966, were more modest. Thus under date of March 23, 1966, Don Vestal, local president of the Teamsters, demanded recognition of his organization as representative of Respondent's sales drivers. He further indicated that the Teamsters were then organizing another segment of Respondent's employees and when a majority of them had designated it as their bargaining representative he would notify Respondent accordingly.

C. Respondent's Refusal To Recognize

By letter of March 28, 1966, Respondent, by its attorney, replied to the Teamsters demand for recognition by rejecting it, stating:

The American Bread Company does not believe that you, in fact, represent a majority of its driver-salesmen and, therefore, declines to recognize Teamsters Local Union No. 327 as bargaining agent for these employees.

If and when Teamsters Local Union No. 327 is certified by the National Labor Relations Board as bargaining agent for the driver-salesmen of the American Bread Company, the appropriate officials of the American Bread

¹ I am administratively advised that this unit found appropriate by the Regional Director in Case 26-RM-182 is presently the subject of review by the Board pursuant to an order of remand in Cases 26-CC-94 and 26-CP-19 involving the Teamsters and Respondent herein. The complaint in the instant case, however, alleges as an appropriate unit all of Respondent's Nashville production and maintenance employees, driver-salesmen,

garage and maintenance employees, and all other employees, with the customary exclusions, and Respondent's answer admits this appropriateness. In the context of the issues presented herein I am not disposed to await the outcome of a final determination of what the most appropriate bargaining unit should be.

Company together with myself will meet with you for the purpose of collective bargaining.

Parenthetically, of the total of 92 driver-salesmen stipulated to be included in the group for whom Vestal demanded recognition, among the 289 total employees on Respondent's March 23 payroll (the one nearest the date of Vestal's demand), only one, employee Wiltshire, was shown to have signed a Teamsters authorization card prior to the demand for recognition. Seven more drivers signed cards between March 31 and April 11, 1966.

D. The Bakery Workers Appear

During March and early April 1966, as correspondence between Respondent and the Teamsters was in progress, the Bakery Workers procured signed authorization cards from 170 of Respondent's employees. On April 5, 1966, the Bakery Workers, through its attorney, Kenneth Harwell, notified Respondent that it represented a majority of all the production and maintenance employees, truckdrivers, relay drivers, route salesmen, relay salesmen, garage employees, relay station employees, sanitation employees, receiving stock employees, thrift store sales employees, and shipping employees. It advised Respondent that it was authorized to bargain with it on behalf of these employees and that it accordingly requested recognition in behalf of them. In support of its claim to majority status the Bakery Workers volunteered to submit its authorization cards to an impartial third party for a card check. Reverend John Sessions of Nashville was agreed upon and after comparing the signed employee authorization cards with payroll signatures provided by Respondent he certified that a majority of Respondent's employees had signed Bakery Workers authorization cards. A tally of these cards in evidence discloses that 170 cards were received of a total of 295 employees previously stipulated to be included in the group, as of April 2, 1966, the payroll date nearest the date of Respondent's recognition of the Bakery Workers.

On or about April 15, 1966, Respondent posted on its bulletin board a notice to the effect that it was negotiating a contract with the Bakery Workers.² As a result of these negotiations a collective-bargaining agreement was executed by the parties on May 8, 1966.³

E. The Contentions of the Parties

It is General Counsel's contention that by violating the neutrality conditions required of an employer when faced with competing claims for recognition Respondent thereby violated Section 8(a)(2) of the Act. Respondent, on the other hand, insists that because it has been shown in the record that

the Teamsters never represented more than 8 of the 92 drivers for whom it sought recognition during the period within which it was making its demand, such a demand was specious and fraudulent. Accordingly, Respondent urges, the nature of the Teamsters claim was not such as would create a real question concerning representation, a basic requirement in the assessment of Respondent's subsequent allegedly unneutral conduct.

F. Conclusions

1. The appropriate unit

It has been agreed upon by the parties and I accordingly conclude and find the following, in the alternative, to be units appropriate for the purposes of collective bargaining.

All salesmen-drivers at Respondent's Nashville, Tennessee, plant, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act constitute an appropriate unit of Respondent's employees for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

All production and maintenance employees, driver-salesmen, garage and maintenance employees and all other employees at Respondent's Nashville, Tennessee, plant, excluding office clerical employees, professional and technical employees, watchmen, guards and supervisors as defined in the Act, constitute an appropriate unit of Respondent's employees for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

2. The effect of Respondent's recognition of the Bakery Workers

Nothing is so firmly established in the law of labor relations as the obligation of an employer to maintain a position of strict neutrality when faced with the conflicting claims of two or more rival unions which give rise to a real question concerning representation in a unit appropriate for collective bargaining.⁴ Implicit in this concept of neutrality is the existence of a real representation question. And in this respect it is understood, of course, that the filing of a representation petition by a rival organization, a condition not present here, is not the *sine qua non*.⁵ What is significant is the character of the rival claim. Thus Respondent invites my attention to the Board's most recent pronouncement on the subject wherein it holds that "an employer does not violate the Act by extending recognition to one of the competing unions where the rival union's claim is clearly unsupported or specious, or otherwise not a colorable claim."⁶

² The credited testimony of employee Wiltshire

³ The credited testimony of Respondent's president, Bernard Evers, Jr

⁴ *Midwest Piping & Supply Co., Inc.*, 63 NLRB 1060, *William Penn Broadcasting Company*, 93 NLRB 1104

⁵ *Novak Logging Company*, 119 NLRB 1573, 1574, and cases cited in fn

4

⁶ *The Boy's Markets, Inc., et al.*, 156 NLRB 105, 107.

In the instant situation certain things are clear: The rivals exist, the claim was made, and by Respondent's recognition of the Bakery Workers and execution of a contract, after the making of the claim, the neutrality was breached. What remains to be determined then is whether, by established standards, the claim of the Teamsters failed to create a real question concerning representation. I find no such deficiency.

The Teamsters demand on March 23, 1966, should not have come as a complete surprise, and indeed there is testimony in the record that President Evers had heard that the Teamsters were "making some effort to organize the employees." Moreover, it is worthy of note that in the litigious atmosphere in which Respondent and the Teamsters were operating over the past year the Teamsters demand for recognition could well have been viewed as one more phase of a continuing engagement. Nor could it possibly have been viewed as a baseless claim, for when last the Teamsters had an opportunity to display its strength among Respondent's employees, in the election the year before, it received 125 votes in an overall unit. It certainly cannot be said, therefore, that the demand, as Respondent received it, was either specious or unsupported. For, while the claim in *The Boy's Markets, supra*, was held by the Board to be "clearly unsupported" (emphasis supplied), here, in contrast, it is not clear at all that the Teamsters claim lacked support.

Nor is it of consequence, as Respondent and the Bakery Workers claim, that the Teamsters may have previously comported itself in a manner not entirely in keeping with the requirements of the Act, referring to the recent findings in Cases 26-CC-94 and 26-CP-19. I know of no authority for the proposition that the only labor organizations eligible for the representation of employees are those of established legal and moral virtue.⁷

Nor is it of consequence that General Counsel has failed to establish the substantiality of the Teamsters representation. Findings based upon evidence adduced at the hearing disclose that but one of the 92 in the unit had authorized the Teamsters to represent him at the time the claim was made; and only seven more joined him in the week that followed, prior to Respondent's refusal. This information, the number of employees signing authorization cards, should be of no concern to an employer when a claim is made, for indeed the cases are legion where the inquires of an employer as to precisely such a fact, the number who signed, have been found to be violations of the Act. Furthermore, as it is clear that it is the practice of the Board to require but one authorization card of a union seeking to intervene in an election,⁸ less

rigid standards cannot be set to permit an employer to free himself of his obligation of neutrality. Consequently, any argument suggesting a showing of substantiality has no place in the situation presented by the Teamsters demand for recognition.

In their briefs to me the parties appear to have confused the requirements for the establishment of a claim that would create a question concerning representation with the substantiality that is required for the filing of a representation petition. It is true, of course, that the filing of a petition establishes such a real question;⁹ and it is equally true that the Board's rules require a showing of interest in the form of authorization cards signed by at least 30 percent of the employees in the unit. This is not to say, however, that a 30-percent showing required for the filing of a petition which is to be used as evidence of the existence of a real question concerning representation automatically and independently becomes the requirement for a demand for recognition where, as here, no petition is involved. I accordingly reject any suggestion that substantiality is an element of a union's claim for majority status in circumstances where a rival situation is created by a union's demand, as distinct from its filing of a petition. To the extent, therefore, that the complaint herein alleges a violation based upon the Teamsters being designated by a "substantial number" of employees (par. 8), I would conclude and find that General Counsel has failed in its proof. But as substantiality is of no moment in the circumstances presented here I would further conclude that, having made its claim, which for reasons previously considered must necessarily be considered colorable,¹⁰ the Teamsters thereby created a real question concerning representation. Upon the foregoing, therefore, it is clear that during the pendency of a real question concerning representation Respondent breached the neutrality required of it by recognizing and bargaining with the Bakery Workers. As such conduct has consistently been held to be interference, restraint, and coercion of employees in the exercise of their statutory rights and unlawful assistance to a labor organization, I conclude and find that Respondent has thereby violated Section 8(a)(1) and (2) of the Act.¹¹

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section IV, above, occurring in connection with its business operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several

⁷ Cf. *N.L.R.B. v. Fulton Bag & Cotton Mills*, 180 F.2d 68 (C.A. 10)

⁸ Cf. *O. D. Jennings and Company*, 68 NLRB 516

⁹ *William Penn Broadcasting Co., supra*.

¹⁰ *The Boy's Markets, Inc., supra*

¹¹ *The Boy's Markets, Inc.*, 156 NLRB 105, 107, *Scherrer and Davison Logging Company*, 119 NLRB 1587, *William Penn Broadcasting Company*, 93 NLRB 1104, *Midwest Piping & Supply Co., Inc.*, 63 NLRB 1060

States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. THE REMEDY

Having found and concluded that Respondent rendered unlawful assistance and support to the Bakery Workers thereby interfering with, restraining, and coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act, I shall recommend that it cease and desist therefrom. Affirmatively I shall recommend that Respondent withdraw and withhold any recognition it has granted the aforesaid Bakery Workers or any other labor organization unless and until the National Labor Relations Board has certified it, or such other labor organization as may qualify, as majority representative of Respondent's employees following a Board-conducted election in either of the units which I have found to be appropriate for the purposes of collective bargaining. I shall further recommend that nothing in the Board's Order be construed as varying or abandoning wages, hours, seniority, or other substantial benefits contained in any outstanding agreement between the Respondent and the Bakery Workers.¹² I shall further recommend that Respondent post the customary notices.

RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend¹³ that American Bread Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Rendering aid, assistance, or support to American Bakery and Confectionery Workers' International Union, AFL-CIO, or any other labor organization, by recognizing it or bargaining with it as a representative of Respondent's employees unless and until it is certified by the National Labor Relations Board as such representative in an appropriate bargaining unit.

Appropriate units are:

All salesmen-drivers at Respondent's Nashville, Tennessee, plant, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act, or

All production and maintenance employees, driver-salesmen, garage and maintenance employees and all other employees at Respondent's Nashville, Tennessee, plant, excluding office clerical employees, professional and

technical employees, watchmen, guards and supervisors as defined in the Act.

Nothing in this Decision and Recommended Order shall require Respondent to vary or abandon any wage, hour, seniority, or other substantive feature on behalf of its employees which the Respondent has established while bargaining with the aforesaid labor organization, or to prejudice the assertion by its employees of any rights they may have derived as a result of membership in or representation by the said labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Post at its Nashville, Tennessee, plant, copies of the attached notice marked "Appendix."¹⁴ Copies of said notice, to be furnished by the Regional Director for Region 26, 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.

(b) Notify the Regional Director for Region 26, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.¹⁵

¹⁴ In the event that this Recommended Order is 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 is 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."

¹⁵ 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 the 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 recognize American Bakery and Confectionery Workers' International Union, AFL-CIO, or any other labor organization, as the representative of our employees for the purposes of bargaining collectively concerning conditions of employment, unless and until said labor organization shall have been certified by the Board as the exclusive

¹² *The Bassick Company, Spring Valley Division, etc.*, 127 NLRB 1552

¹³ In the event that this Recommended Order be adopted by the Board, the word "Recommended" shall be deleted from its caption and wherever else it thereafter appears, and for the words "I Recommend" there shall be substituted "the National Labor Relations Board hereby orders."

DECISIONS OF NATIONAL LABOR RELATIONS BOARD

representative of such employees in a unit appropriate for collective bargaining.

WE WILL NOT vary or abandon any wage, hour, seniority, or other substantive feature established in behalf of our employees while bargaining with the American Bakery and Confectionery Workers' International Union, AFL-CIO, nor will we deny our employees any right derived as a result of their membership in or representation by said labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

All our employees are free to form, join, or assist any labor organization, or to refrain from doing so.

AMERICAN BREAD
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, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee 38103, Telephone 534-3161.