

**Winn-Dixie Raleigh, Inc. and United Food & Commercial Workers International Union, Local 525, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC and International Union of Operating Engineers, Local 465, AFL-CIO. Cases 11-CA-8839, 11-CA-9490, and 11-CA-9927**

19 August 1983

## DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND  
HUNTER

On 27 April 1982 Administrative Law Judge James T. Youngblood issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

### 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 Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

<sup>1</sup> No exceptions were filed with respect to the Administrative Law Judge's findings that Respondent did not violate Sec. 8(a)(1) of the Act by the various conversations between Respondent's supervisors and its employees relating to the reasons why the represented employees did not receive a wage increase and that Respondent did not violate Sec. 8(a)(3) by its refusal to hire Sharon Pierce.

### DECISION

#### STATEMENT OF THE CASE

JAMES T. YOUNGBLOOD, Administrative Law Judge: The consolidated complaint which issued on July 28, 1981, alleges that Winn-Dixie Raleigh, Inc. (herein Winn-Dixie), since on or about June 30, 1979, has engaged in acts and conduct in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, herein called the Act. Respondent filed an answer to the consolidated complaint denying the commission of any unfair labor practices, and stating that portions of the consolidated complaint were settled and approved by the Regional Director on July 31, 1980, prior to the hearing in this

matter, and that said settlement should be reinstated. Respondent denies that it has engaged in any acts or conduct which would have warranted the Regional Director in setting that settlement agreement aside. This matter was tried before me in Durham, North Carolina, on August 24 and December 1 and 2, 1981. All parties were represented at the hearing and Respondent and the General Counsel filed post-trial briefs which have been duly considered.

Upon the entire record, and from my observation of the witness, and their demeanor, and after due consideration of the briefs filed by the parties, I hereby make the following:

#### FINDINGS AND CONCLUSIONS<sup>1</sup>

##### I. THE BUSINESS OF RESPONDENT

Respondent is a North Carolina corporation with facilities located at Raleigh and Durham, North Carolina, where it is engaged in retail grocery sales. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

##### II. THE LABOR ORGANIZATIONS INVOLVED

United Food & Commercial Workers International Union, Local 525, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC (herein the Union), and International Union of Operating Engineers, Local 465, AFL-CIO (herein Engineers), are labor organizations within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

In August 1979 the Union began an organizational campaign among Respondent's meat fabrication room employees in Respondent's Raleigh, North Carolina, warehouse. On October 19, 1979, a majority of the employees in the Respondent's meat fabrication department in the warehouse distribution center located in Raleigh, North Carolina,<sup>2</sup> by a secret-ballot election in Case 11-RC-4768 conducted under the supervision of the Regional Director for Region 11 of the Board, designated and selected the Union as their representative for the purpose of collective bargaining. On October 29, 1979,

<sup>1</sup> The facts found herein are a compilation of the credited testimony, the exhibits, and stipulations of fact, viewed in light of logical consistency and inherent probability. Although these findings may not contain or refer to all of the evidence, all has been weighed and considered. To the extent that any testimony or other evidence not mentioned in this Decision may appear to contradict my findings of fact, I have not disregarded that evidence but have rejected it as incredible, lacking in probative weight, surplusage, or irrelevant. Credibility resolutions have been made on the basis of the whole record, including the inherent probabilities of the testimony and the demeanor of the witnesses. Where it may be required I will set forth specific credibility findings.

<sup>2</sup> The appropriate unit is:

All production and maintenance employees employed at the employer's meat fabricating department in the warehouse distribution center located in Raleigh, North Carolina, excluding all other employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

the Regional Director certified the Union as exclusive representative of the employees in the appropriate unit.

Thereafter the parties began a bargaining relationship, which according to the complaint was immediately violated by Respondent's unilateral and discriminatory layoff of eight employees on December 12, 1979. Thereafter charges and amended charges were filed by the Union and on February 11, 1980, the General Counsel in Case 11-CA-8839 issued a complaint alleging various 8(a)(1) violations by Respondent beginning on or about June 30, 1979, and alleging as violations of both Section 8(a)(3) and (5) the unilateral and discriminatory layoff of eight employees on December 12, 1979. Thus, the complaint appears to have covered all violations up to its issuance on February 11, 1980. On July 28, 1980, Respondent and the Union executed and entered into a settlement agreement in Case 11-CA-8839 which was approved by the Regional Director for Region 11 of the National Labor Relations Board on July 31, 1980. This settlement agreement, among other things, provided for reinstatement of the alleged discriminatory laid-off employees with backpay, and apparently covered all of the other alleged violations in the complaint which issued in February 1980.

As indicated earlier following the certification in October 1979 the parties began bargaining. Their first bargaining session was held on December 4, 1979. At this meeting the Union presented Respondent with its contract proposals in written outline form. This contract proposal requested a 10-percent or 74-cent wage increase for the meat fabricating department employees in the Raleigh warehouse. It appears that most of this meeting was utilized by the parties in discussing a proposed layoff of employees or the Union's waiver of a 40-hour week guarantee which the Company had proposed in a letter in November 1979. The meeting apparently concluded with Respondent advising the Union that it would be in touch before any layoffs were made. On December 6, 1979, the Union informed Respondent's counsel of its position regarding the proposed waiver of the 40-hour week guarantee or face layoff of certain employees. In addition the Union called to the Company's attention certain other alleged unfair labor practices it had committed and requested that they cease. According to Coutlakis, an International representative of the Union, the next meeting in which a wage increase proposal was submitted by the Union was on May 6, 1980. This proposal sought a wage increase of \$1.39. There was no discussion on this proposal.<sup>3</sup>

In July 1980 while the negotiations were underway Respondent granted a wage increase to the nonrepresented employees in the Raleigh warehouse, in varying amounts from \$.90 to \$1.10 an hour. According to the Union when it learned of this, it asked the Respondent to give the represented employees the same increase. According to the Union the Company refused.

At the next meeting in August 1980 the Union again asked Respondent to grant the increase that had been

<sup>3</sup> It appears that the parties by previous agreement had concluded that economic issues would not be discussed so long as there were outstanding noneconomic issues.

given to the nonrepresented warehouse employees, to the meat fabrication employees. Again according to Coutlakis Respondent refused to implement a wage increase for the represented employees. Coutlakis testified that in October 1980 the Company made its wage proposal which amounted to an increase of 52 cents an hour. The Union contends that in the past the meat cutting employees had always received more of a wage increase than the forklift operators in the warehouse, and as the forklift operators received \$1.10 an hour the meat fabrication employees therefore should have received at least that amount. The Union refused to accept Respondent's proposal, but agreed that Respondent should implement the 52-cent-an-hour wage increase, and the Union stated, "we will go to the labor board for the rest because this is a discriminatory proposal."

According to the documents submitted in evidence the fab-room employee's rate of pay effective July 5, 1979, was \$7.40 an hour. A 10-percent increase in that as proposed by the Union in December 1979 would be an increase of 74 cents. In its proposal of May 6, 1980, the Union proposed a new wage rate of \$8.79, a \$1.39 increase over the \$7.40 that the fab-room employees were making at that time. As stated earlier the parties did not discuss wages at this meeting but it does appear that there was substantial agreement by the parties on many other articles of this proposed agreement.

From this record it appears that in the past all employees in the warehouse were given a periodic wage increase sometime in the months of June, July, or August, although it is not clear from this record the exact amount or the percentage given to each employee.

As I understand the complaint of the General Counsel the failure Respondent to grant the periodic raise increase to its fabrication employees was solely because of their union representation and thus violative of Section 8(a)(3), and as it was discontinued unilaterally it was violative of Section 8(a)(5).

In addition to this allegation of the complaint the General Counsel alleges certain independent 8(a)(1) violations which allegedly demonstrate that the Respondent's withholding of the pay increase for the unrepresented employees was discriminatory in violation of Section 8(a)(3) and also a refusal to bargain in violation of Section 8(a)(5).

Employee George Richardson testified that, in July 1980, supervisor Robert Bass was in the meat fabrication room and asked Richardson if he had heard anything about a pay raise. Although according to Richardson Bass asked the question about a pay raise, his testimony was that, Bass said, "no, what made me think I was going to get one." Richardson informed Bass that they had always received a raise with the rest of the warehouse. Bass replied that "that didn't mean that we were going to get one this year." Bass testified that he had a conversation with Richardson and that Richardson approached him and asked if they were going to get a raise. He told Richardson, "George, I haven't heard anything on a raise," and Richardson said again, "Well, are we going to get a raise?" And Bass responded, "George, I don't know, I haven't heard anything on it." Accord-

ing to Bass that was the extent of the conversation. Bass testified that he has had several conversations with George Richardson concerning a raise and that during these conversations the Union was never mentioned.

According to Richardson in August 1980, he went to the fab-room office, where Mack Creech and Robert Bass were present. Richardson asked Creech if there would be overtime that week and Creech indicated that there would be some. Richardson responded that he was glad as he could use the extra money "because we hadn't gotten a raise yet." According to Richardson Bass said, "I bet you already have gotten one."<sup>4</sup> Richardson said he "wouldn't bet because most of the time it's a couple of weeks maybe, or a couple of months before we get one." Bass said, "I bet you wouldn't have gotten one this year." Richardson testified that about a month later he was in the office talking to Bass about a pay raise and Bass stated "that we probably might already have gotten it if we hadn't gone uptown looking for someone else, you know." Bass denied that he had the latter conversations with Richardson and denied that he had any conversation with Richardson where Mack Creech was present. Creech also testified that he was never present at any time when Bass had a conversation with Richardson. To the extent that there is a discrepancy in the testimony of Richardson and Bass I credit Bass. Richardson's testimony was confusing and in certain respects did not make sense and seemed to support Respondent. Bass' testimony was straightforward and had a ring of truth.

According to employees Bobby Lucas on October 9, 1980, he was called to the office of Supervisor Eddie Tant, who was informing the employees that tonnage was down. Lucas disagreed, and said that he had not received a wage increase; that he gave Company a fair day's work, but he had not received any pay. Lucas said that Tant told him that the Company wanted to give them a raise but other people would not let them. Lucas said, "do you mean the Union?" And Tant did not answer. Lucas said, "Well, if you mean the union, the union hasn't turned down any raises." Lucas stated that Tant replied that he could not give a raise and that Whitley could not give a raise.

Tant recalled the conversation and said that Lucas had asked about tonnage being down, and Lucas approached him about the fact that he had not received a raise. He told Lucas he had no authority to give a raise or to take raises away. He said that the Union was mentioned during this conversation, in that Lucas had said that they had not received a raise because they were in the Union. Tant did not say anything and merely walked off. He said he had no other conversation with Lucas in which a wage increase was mentioned. To the extent that there is any discrepancy in the testimony of Lucas and Tant, I credit Tant's version.

According to employee Stacy Jackson on August 6, 1981, he talked with Robert Bass about buying some new machines. Bass said the Company did not have enough

money, and Jackson responded by saying that you should have because they did not get a raise. He told Bass that they worked as hard as the other boys in the warehouse and they got a raise and we did not. He said Bass replied, "Well, because they went about it in a different way."

Bass recalled the conversation and stated that Jackson informed him that some machines were worn out. He said, "are you going to buy us some new machines?" Bass informed him, "We are in the process of remodeling the fab room and we are supposed to get some new equipment, but to what extent, or what type of equipment, you know, I just don't know at this time." He said there was absolutely no discussion of a wage increase during this conversation and there was no mention about the fact that the Company should have enough money to buy new machines because Jackson had not received a wage increase. He denied making any comment that the other employees got a raise because they went about it in a different way. I credit Bass.

I have carefully reviewed the testimony of the employees and the supervisors in this regard and there appears to be only some slight differences in content and that deals with the fact of whether or not the supervisors informed the employees that the reason that they were not getting a raise was because of a third party, a union, or because they had chosen a different way to get a raise. As indicated I have credited the testimony of the supervisors where there is any discrepancy. In all instances the employees approached the supervisors wanting to know why they had not received a wage increase as the other unrepresented employees in the warehouse had received a wage increase. In my view the supervisors merely informed the employees that they had no authority to grant wage increases. And, if the supervisors said anything, they merely informed the employees that to their knowledge the only reason that they were not getting the wage increase was because they had selected a bargaining representative and that the Company was in no position to give a raise increase without first discussing and seeking approval from their selected representative. It is clear to me that the supervisors were merely informing the employees that they now had a bargaining representative and Respondent was in no position to grant them wage increases as they had in the past. I do not regard any of these conversations as being intimidating, coercive, threatening, or in any way interfering with the employee's Section 7 rights. Therefore I will recommend dismissal of the 8(a)(1) allegations of the complaint in this regard.

#### The Alleged Refusal To Hire Sharon Pierce

Sharon Pierce testified that in January 1981 she was laid off by Anthanol, an employer in the Raleigh area, along with 30 other employees. She testified that as an employee of Anthanol she was represented by the Operating Engineers Union. She testified that on June 1, 1981, between the hours of 7 and 8 o'clock in the evening she went to the Winn-Dixie store in North Duke Mall, Durham, North Carolina. She talked to Monty Coates, the manager of that store, and asked him if they were

<sup>4</sup> The General Counsel filed a motion to correct the transcript to add the word "would" in this sentence and to change the word "wouldn't" to "would" in l. 14, p. 54, of the transcript. Respondent filed an opposition to this motion. In agreement with Respondent's opposition the General Counsel's motion is denied.

hiring for the job of cashier. He informed her that he needed some part-time help. He gave her an application which she filled out and returned. He told her to come to the store the next day around 4 p.m. She said she went back the next day and talked with the assistant manager who gave her some tax papers to fill out. She returned on Wednesday, June 3, around 3 p.m. and talked to Coates. He started explaining the policies and rules of the store and told her about being nice to customers. He asked what size clothes she wore and got her a pair of pants and a top. The top was size 8 and the pants were size 6. He told her they looked nice and explained that, if she were not actually engaged in cashiering functions, she should bag groceries, clean off the register table, or straighten magazines to find something to do.

She said he explained quite a lot about the work and the schedule. She asked if she would get paid while in training and he said yes that it was an on-the-job training. She asked when she would get a raise, and he said that every 6 months, and that she would start at \$3.35 an hour. She said that they were getting along just fine and that he was going down the questions on the sheet of paper, and when he got down to the part about a union he said that Big Star and Kroger and a few other stores had unions but that they did not believe in unions. That it was just a money organization that took your money and did not do anything for you. She said she looked at him and said she was familiar with the union, that "Anthanol had a union." She said he then asked her if she was a member of the union and she said yes. He asked her if she had a union card and she said yes. He told her to tear that up and get rid of it and then he looked at her and said, "Under the circumstances, I can't use you anyway."

Then he went back to the application and started looking at it, and asked how many hours she got at Anthanol; what she was getting paid, and as she had been laid off he asked her could she be called back to work and she said yes she could. He said, "You'll have to go to Anthanol and terminate yourself and tear up your union card, throw it away." Then he looked up and said, "Under the circumstances, I just can't use you anyway." She said she left, went home, and, as she was feeling kind of depressed, she called Clayborne Ellis, the Operating Engineers' business agent, and told him that the Union had lost her job for her. That she had the job at Winn-Dixie until they found out she was a member of the Operating Engineers. She said that Coates told her that he did not want to hire someone who would work just a short while and then leave to go back to another job paying more money. He asked if she would leave Winn-Dixie to go back to Anthanol if Anthanol called her back. She said she told him that she could not answer that question because she had not worked for him yet. And she said that even though she might be making \$1.50 an hour less at Winn-Dixie if she liked the job she would stay there rather than going back to Anthanol.

Monty Coates testified that he worked in the Winn-Dixie store about 2 miles from the Anthanol plant at one time and was familiar with the fact that the plant was union and that around June 3, 1981, he did have conver-

sation with Sharon Pierce at the North Duke Mall store where he was store manager. He testified that he had been called earlier by another Winn-Dixie store manager, Keith Cooley, who recommended her as a part-time cashier. He said that Cooley informed him that her brother-in-law worked for Winn-Dixie in the scanning management. As he needed part-time help he told Cooley to send her over. He testified that about an hour later she came to the store and it was 2 or 3 o'clock in the afternoon, on June 3, 1981. He gave her an application to fill out and after she had filled out the application he looked it over. Wanting to put her to work he gave her an application kit which contained other information such as W-4 forms, etc., and told her to fill out these forms and return them. In about 20 or 30 minutes she had filled out all the papers, including the so-called indoctrination sheet for new employees, which dealt with store policy and company policies. He said that they discussed these policies, and when they got down to the part about unions he told her that Winn-Dixie did not believe in unions, that if she had any problems at the store that Winn-Dixie management could take care of them for her, and that Winn-Dixie wages were in line with the economy. Pierce then told him that she was a member of the Union and that the Union had been good to her. She said she had been laid off, but if Anthanol recalled her she would go back to work for Anthanol. He said that he stopped at this point because she told him that she would leave if recalled. He said he told her that if she would quit her job he would put her to work and she told him that she would not quit her job. He told her that he would just have to review the application some more. At this point she left the store.

He testified that he knew the Anthanol plant was unionized and that he knew this before she filled out the application and other forms. But because she told him that she would leave to go back to work in the event that Anthanol called her back, that he did not want to hire her. He was afraid that if he put her to work and wasted time training her that he would just be left holding the bag. He said that he talked with Sharon Pierce only once and that at no time did he tell her to tear up her union card in order to go to work for Winn-Dixie.

I carefully observed both Pierce and Coates as they testified in this proceeding. I was more impressed by the testimony of Coates and his demeanor. His testimony, in my view, had more of a ring of truth and was more straightforward than that of Pierce. Therefore, I credit the testimony of Coates over that of Pierce and conclude that Coates did not refuse to hire Pierce because of her union membership or union activities. In my view when Coates learned that Pierce might go back to Anthanol if recalled he decided against hiring her. I credit his testimony that he was aware of the fact that she worked in a union plant and probably was a member of a union. Under these circumstances, in my view, he would not have interviewed her in the first place had he planned on refusing to hire her because of her union affiliation. Therefore, it is my conclusion that the General Counsel has failed to establish by a preponderance of evidence that Respondent has engaged in conduct violative of

Section 8(a)(3) of the Act in its refusal to hire Sharon Pierce. Accordingly, I shall recommend that this allegation of the complaint be dismissed in its entirety.

#### Discussion and Conclusions

As indicated I have concluded that the General Counsel has failed to establish that Respondent violated Section 8(a)(1) of the Act by various conversations between Respondent's supervisors and its employees relating to the reasons why the represented employees did not receive a wage increase. Additionally I have concluded that the General Counsel has failed to establish that Respondent violated Section 8(a)(3) of the Act by its refusal to hire Sharon Pierce.

As I understand the complaint that leaves for disposition the remaining issue of whether Respondent violated Section 8(a)(3) and (5) by its refusal or failure to give its annual periodic raise to the fabrication employees who were represented by the Union and at the same time gave a raise to all of the other unrepresented employees in Respondent's distribution center in Raleigh, North Carolina.

I have found that Respondent had a practice of giving an annual raise to all of the employees in its distribution center or warehouse in Raleigh, North Carolina. However, the amount of that raise apparently was determined on a yearly basis and had no set amount. It is also clear that in July 1980, Respondent did give an annual raise to the unrepresented employees in the distribution center, and withheld the annual raise from the represented employees in the fabrication room. Did Respondent violate Section 8(a)(3) and (5) by this action?

A review of the facts in this matter indicate that in December 1979 the Union proposed a 10-percent wage increase for the represented employees in the fabrication room. It also appears that the parties agreed that economic issues would be considered after all noneconomic issues were resolved. At this time Respondent had not offered any counterproposal to the Union's 10-percent wage increase. It is also true that in May Respondent revised its wage package to include a wage increase that would amount to \$1.20 an hour. Again at this time Respondent made no counterproposal. In July Respondent gave the annual wage increase to all the unrepresented employees in the distribution center and as indicated did not give this annual wage raise to the employees represented by the Union.

At this time there was a wage proposal from the Union pending on the bargaining table. It is also true that the Union informed Respondent that it was free to implement the wage increase for the union-represented employees in the fabrication room. However, it is apparent that the Union wanted a wage increase for those employees of at least \$1.10 an hour, the amount given to the forklift operators. Respondent refused to give this wage increase to the represented employees, apparently because it felt that this increase was more than it was willing to give. It appears that at a later date the Union informed the Employer to again implement the wage increase of at least \$1.10 an hour, and Respondent refused. In October Respondent made its wage offer of 7 percent, 3 percent less than the Union had initially requested. The

Union refused this wage increase, but informed Respondent to implement the 7-percent increase which amounted to \$.52 an hour and informed Respondent that it would seek the difference from the National Labor Relations Board. These are essentially the facts surrounding this problem.

In *Oneita Knitting Mills*, 205 NLRB 500, fn. 1 (1973), the employer involved in that case argued that a unilateral grant of wage (merit) increases would be a violation of Section 8(a)(5) as it would be inconsistent with the Board's holding in *Southeastern Michigan Gas Co.*, 198 NLRB 1221 (1972), where the Board found a discontinuance of merit increases to be a violation of Section 8(a)(5). The Board disagreed with the employer's contention and stated:

An employer with a past history of a merit increase program neither may discontinue that program (as we found in *Southeastern Michigan*) nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. *NLRB v. Katz*, 396 U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

As I understand this case and the cases cited therein it is clear that an employer can neither give nor deny pre-existing annual wage increases without some discussion with the union which is the current bargaining representative of the employees involved. Here the parties had the subject of wages on the bargaining table for the employees represented by the Union. The Union had demanded a 10-percent wage increase and later revised that increase to \$1.39 an hour, which almost doubled the previous 10-percent wage demand, prior to the time the general annual wage increase was due. Thus, in July when the annual wage increase was due Respondent was confronted with an approximate 20-percent annual wage increase at the bargaining table. With this confronting it, it did not give to the represented employees the annual wage increase it gave to the other employees. Even when the Union requested that it grant that wage increase to the represented employees, Winn-Dixie refused and did not give any wage increase until it had made its wage proposal known to the Union. The Union rejected Respondent's proposal, but informed Respondent that it could implement that wage proposal, and that it would seek the balance before the National Labor Relations Board.

Under the circumstances of this case even considering Winn-Dixie's track record, it is my conclusion that Respondent did not violate Section 8(a)(3) or (5) in withholding the wage increase from the employees represented by the Union. There is nothing in this case that would indicate that Respondent was illegally motivated in this regard and in fact once it had made its wage proposal known to the Union, which incidentally was only 3 per-

cent less than that originally proposed by the Union, with the Union's approval it implemented that wage increase and so far as this record is concerned continued to bargain in good faith with the Union. Additionally, there is nothing in this record to indicate that the bargaining which took place between December 1979 and October 1980 when Respondent implemented the 52-cent wage increase was anything other than good-faith bargaining. In fact this record indicates that with one or two exceptions, involving wages and pensions, the parties had negotiated almost a complete package.

I have carefully reviewed the briefs filed by the parties and engaged in considerable research on my own. However, I find nothing which supports the proposition that an employer violates either Section 8(a)(3) or (5) by its refusal to grant an annual wage increase, which it previously gave to all employees, to its represented employees and at the same time grants that annual wage increase to its unrepresented employees, at a time when the employer is at the bargaining table with the union that represents the represented employees and the subject of wages is pending and under negotiations at that bargaining table.

Once a bargaining agent is in the picture an employer is not free to give or deny wage increases without consulting that bargaining agent. Here Respondent had been consulting with the Union for approximately 8 months, and, although economic issues had been put aside, there obviously was no meeting of the minds on any wage increase. To compel an employer to grant a wage increase to employees at a time when it is engaged in bargaining negotiations with the bargaining agent representing those employees would certainly take away much of an employer's bargaining power. The employer might well trade off a wage increase for a concession in some other area. In my view there is nothing in the Act that guarantees employees that all conditions they enjoy will remain the same after they select a bargaining agent. I see no reason why this Respondent should be held in violation of Section 8(a)(3) or (5) because of its failure to grant the wage increase at a time when it was currently engaging in good-faith bargaining with the represented employees' bargaining agent and the subject of wages was presently pending on the bargaining table.

Moreover the ultimate wage increase offered by Respondent, 7 percent, or 52 cents an hour, was only slightly less than that sought initially by the Union and I find nothing which would indicate that this Respondent was illegally motivated, other than its past record. Although it appears that Respondent engaged in some unfair labor practices prior to the settlement agreement in this matter,

it is my conclusion that it did not thereafter engage in any unfair labor practices and I would dismiss the complaint insofar as it alleges that Respondent engaged in unfair labor practices after the settlement agreement. Accordingly, I would dismiss the 8(a)(1), (3), and (5) allegations of the consolidated complaint which allegedly occurred after the execution of the settlement agreement.

#### CONCLUSIONS OF LAW

1. The Respondent, Winn-Dixie Raleigh, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food & Commercial Workers International Union, Local 525, affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC, and International Union of Operating Engineers, Local 465, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent, Winn-Dixie Raleigh, Inc., did not violate Section 8(a)(1), (3), and (5) of the Act after the execution of the settlement agreement in July 1980 as alleged in the consolidated complaint which issues on July 28, 1981.

Based upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>5</sup>

It is hereby ordered that the complaint in this proceeding, insofar as it alleges that Respondent violated Section 8(a)(1), (3), and (5) of the Act after the settlement agreement of July 1980 be and it hereby is dismissed in its entirety.

IT IS FURTHER ORDERED that the remaining allegations of the complaint which were the subject of the settlement agreement of July 1980 be remanded to the Regional Director for Region 11 and be disposed of consistent with the provisions of that settlement agreement.<sup>6</sup>

<sup>5</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>6</sup> It is my conclusion that Respondent did not violate the terms of the settlement agreement as alleged in the complaint and that settlement agreement should be reinstated and the complaint upon which that settlement agreement was predicated be ultimately dismissed as provided in that settlement agreement.