

In the Matter of JOHN MINDER AND SON, INC. and BUTCHERS UNION,  
LOCAL No. 174

*Case No. C-303.—Decided April 22, 1938*

*Meat Products Industry—Interference, Restraint or Coercion—Unit Appropriate for Collective Bargaining:* employees engaged in manufacture of meat products, excluding supervisory employees; eligibility for membership in only organization among employees; occupational differences—*Representatives:* proof of choice: stipulation that union represents a majority of employees in appropriate unit—*Collective Bargaining:* charges of refusal to bargain collectively not sustained—*Discrimination:* discharge: for union membership and activity; to discourage membership in union; lay-offs: charges of not sustained—*Back Pay:* awarded.

*Mr. John T. McCann*, for the Board.

*Evarts, Choate, Curtin, & Leon*, by *Mr. Michael Ryan*, of New York City, for the respondent.

*Mr. William Karlin* and *Mr. Leo Greenfield*, of New York City, for the Union.

*Mr. S. G. Lippman*, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges and amended charges duly filed by Butchers Union, Local No. 174, herein called the Union, the National Labor Relations Board, by Elinore Morehouse Herrick, Regional Director for the Second Region (New York City), issued its complaint, dated July 20, 1937, against John Minder and Son, Inc., New York City, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5), and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

The complaint and an accompanying notice of hearing were duly served upon the respondent and the Union. Upon the respondent's request, the hearing was postponed from August 12, 1937, to August 25, 1937. On August 16, 1937, the respondent filed an answer which

in substance admitted the allegations concerning the nature of its business, but denied that it had committed any of the unfair labor practices alleged in the complaint.

Pursuant to notice, a hearing was held in New York City on August 25 through August 31, 1937, before Alvin J. Rockwell, the Trial Examiner duly designated by the Board. The Board, the respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence bearing upon the issues was afforded all the parties.

On November 17, 1937, the Trial Examiner filed his Intermediate Report in which he found that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5) of the Act and recommended that the respondent cease and desist from its unfair labor practices and bargain collectively with the Union upon its request. Thereafter, the respondent filed exceptions to the rulings of the Trial Examiner as well as to the findings and conclusions of the Intermediate Report. The respondent also filed a brief in support of its exceptions.

The Board has reviewed the rulings of the Trial Examiner on motions and objections to the admission of evidence and finds that no prejudicial errors were committed. The rulings are hereby affirmed. The Board has considered the exceptions to the Intermediate Report and the brief filed in support thereof and finds the exceptions without merit except as hereinafter indicated.

Upon the entire record in the case, the Board makes the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENT

The respondent, a New York corporation, has its office and place of business in New York City and is engaged in the manufacture and distribution of meat products, employing from 30 to 40 employees.

The respondent's chief raw materials are meats of various kinds. During the period from April 1, 1937, to August 25, 1937, the respondent received 1,542,523 pounds of meat for use in its business. Of this amount 841,893 pounds were received from sources outside of the State of New York and 700,630 pounds of meat from points within the State of New York. From April 1, 1937, to August 25, 1937, the respondent delivered 2,741,029 pounds of meat to its purchasers. Of this amount 884,151 pounds were delivered to purchasers outside the State of New York and 1,856,878 pounds to purchasers located within the State of New York. The respondent has applied for and received the meat-inspection service of the Department of Agriculture. This service is supplied only to firms engaged in interstate commerce.

## II. THE UNION

Butchers Union, Local No. 174 is a labor organization affiliated with Amalgamated Meat Cutters & Butcher Workmen of North America, an affiliate of the American Federation of Labor. Butchers Union, Local No. 174, admits into membership all the respondent's employees who are engaged in the manufacture of meat products, with the exception of supervisory employees.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The refusal to bargain*

## 1. The appropriate unit

The Union contends that the respondent's employees principally engaged in the manufacture of meat products, excluding supervisory employees, constitute an appropriate unit for the purpose of collective bargaining. This unit would exclude all the shippers, truck drivers, and clerical employees. The respondent insists that all of its employees together constitute an appropriate bargaining unit. The record is clear that the employees in the unit advocated by the Union, being primarily engaged in the manufacture of meat products, are differentiated in skill and experience from the balance of the respondent's employees who are primarily engaged in tasks unrelated to the manufacturing process and who are, therefore, not eligible for membership in the Union.

We find that the respondent's employees engaged principally in the manufacture of meat products constitute an appropriate unit for the purposes of collective bargaining in the respondent's plant. This unit includes the two girl assistants and the three men employed in the curing department.

## 2. Representation by the Union of a majority

There are between 15 and 18 employees in the unit found to be appropriate. It was stipulated by the respondent that on April 15, 1937, the Union represented a majority of its employees in the manufacturing department and curing room. In accordance with this stipulation we find that on April 15, 1937, and at all times thereafter, the Union was the representative of the majority of the respondent's employees in the appropriate bargaining unit and by virtue of Section 9 (a) of the Act was the exclusive representative of the employees in the unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

### 3. The alleged failure to bargain

On April 15, 1937, William B. Minder, Sr., the respondent's president, was not present when Alex Drefke, business agent for the Union, and Joseph Belski, vice president of the International Union, called at the respondent's plant. They stated to William Minder, Jr., an officer of the corporation, that the Union represented a majority of the respondent's employees and submitted a copy of the Union's usual form of contract. About April 21, 1937, Drefke arranged with Minder, Sr., for a bargaining conference, which was held a few days later, attended by Drefke, Belski and Minder, Sr. At this conference there was discussion of the respondent's business, and Minder, Sr., declared that the respondent was unable to meet the Union's standard of wages and hours because of the nature of its business. Belski replied that the Union would not insist upon immediate compliance with the terms and conditions of the contract but would give the respondent an opportunity to make the necessary adjustments. Although Minder, Sr., was firm in his refusal to sign the form contract, he indicated that he was willing to meet with the Union at any future date.

At a second conference held on April 27, 1937, attended by Drefke and Minder, Sr., the parties maintained the same positions and reiterated the same arguments advanced at the first conference. On June 2, 1937, representatives of the Union and the respondent met in the office of the Regional Director for the Second Region and made arrangements for a bargaining conference to be held on June 7, 1937, at the office of the attorney for the Union.<sup>1</sup> Drefke testified that at this conference Minder, Sr., stated that in order to compete successfully for business contracts, he was unable to accept the terms of the Union contract. Neither party was willing to compromise, and the conference terminated after 15 minutes. Thereafter, the Union made no further attempt to bargain with the respondent.

The respondent is a relatively small concern in the meat-producing industry. It appears to us from the record that the respondent was sincere in its belief that it could not conform to the Union scale of wages and hours and continue to operate successfully on a competitive basis in the industry. The Union, on the other hand, insisted that the respondent sign the particular contract containing the Union wage scale and hours, maintaining that the respondent's business was no different from that of others in the industry. The differences which developed between the parties concerned real and substantial issues. Although the respondent's position apparently precluded the particular collective agreement sought by the Union, the re-

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<sup>1</sup> Karlin, the attorney for the Union, failed to appear at this conference. The negotiations were carried on by Drefke, Karlin's assistant, and Minder, Sr.

spondent indicated a willingness to bargain with the Union on some other basis.

Under these circumstances, we find that the respondent has not refused to bargain collectively with the Union. We shall, therefore, dismiss the allegation of the complaint alleging that the respondent failed to bargain collectively within the meaning of Section 8 (5) of the Act.

### *B. The Discharge of Ernst Schmocker*

*Ernst Schmocker* was hired by the respondent in the autumn of 1936 and worked at the sausage bench. During the spring of 1937, Schmocker joined the Union and was active in soliciting the respondent's employees for membership in the Union.

On May 7, 1937, Dr. Alvin Staub, chief inspector of the New York Division for the Meat Inspection Division of the Bureau of Animal Industry, Department of Agriculture, visited the respondent's plant and complained of the congestion in the manufacturing department, stating that not more than 8 of the 12 men working at the sausage bench should be allowed to work there. He testified at the hearing that in his opinion the situation could only be remedied by the removal of several employees from the sausage bench.

Minder, Sr., on May 8, 1937, informed Joseph Kuffer, foreman of the manufacturing department, that three or four men would have to be laid off by the end of the month and that one employee would have to be laid off that morning, the choice being left to Kuffer's discretion.

Schmocker testified that after informing the men of Dr. Staub's investigation and the resultant necessity to reduce the force, Kuffer said, "Well, it is too much going on about the Union, and whoever wants to quit should quit and go home." Then he said,<sup>2</sup> "Well, Ernst, I think I will start with you, the first one, and the others will follow. Take your bundles and tools and don't forget nothing because you don't have to come back anymore." Schmocker further testified that before he left Kuffer said to him, "Well Ernst, you should know better than to do a thing like that, you know Mr. Minder don't like to have unions and all that stuff." Adolph Hutzenlaub, Richard Baumeister, and Albert Fischer, three employees in the manufacturing department, corroborated Schmocker's version of the circumstances surrounding the discharge. Kuffer denied making such statements. According to his testimony he told the assembled employees of Dr. Staub's investigation, added that some men would have to leave, and called for volunteers. When no one volunteered, he chose Schmocker to be laid off.

<sup>2</sup> All the conversation at the Minder plant on this occasion was in German.

At a subsequent meeting of employees called by Minder, Sr., on May 13, 1937, Baumeister got into an argument with Kuffer over Schmocker's discharge and accused him of referring to Schmocker's Union activities when he discharged him. Kuffer admitted to Baumeister during the argument that he had made such remarks to Schmocker. This admission was not denied by Kuffer.

At the May 13, 1937 meeting, Minder, Sr., informed the employees of the manufacturing department that charges had been filed with the Board to the effect that Schmocker had been discharged for union activities. He then read and asked them to sign a statement which he had prepared concerning the circumstances of Schmocker's discharge. The statement read in part as follows:

The only reason we understand for our foreman's action<sup>3</sup> was due to the fact . . . Dr. Staub visited our bologna kitchen . . . and found conditions too crowded.

The Union of which we are all members . . . has complained to the Agricultural Department . . . in order to bring pressure upon Mr. Minder to cause him to sign with our Union.

At no time did we hear our foreman tell Ernst Schmocker that he was being laid off because he belonged to the Union . . .

All the employees present except Baumeister, Hutzenlaub, and Fischer signed the statement, although it appears that some of them had not been present at the time of Schmocker's discharge and consequently had no independent knowledge of the incident and others did not understand English well enough to know what they were signing. In view of these considerations and the fact that Minder, Sr., prepared and requested the assembled employees to sign the statement, we do not credit it as an accurate account of the circumstances surrounding Schmocker's discharge.

Furthermore, the respondent's failure to apply its customary seniority rule in Schmocker's case without apparent reason, persuades us that the necessity to reduce its staff was not the real reason for his discharge. The respondent stated that it was its practice to lay off employees according to seniority. However, there was no contention made that Schmocker was laid off on the basis of seniority, because as a matter of fact he had more seniority than three other employees.<sup>4</sup> The respondent did not attempt to explain this departure from its usual practice in Schmocker's case. Kuffer, however, when pressed for an explanation, stated that Schmocker was in ill health. Nevertheless, this explanation was contradicted by Minder, Sr., who denied ever stating that Schmocker was discharged for that reason.

<sup>3</sup> The statement referred to the discharge of Ernst Schmocker on May 8, 1937.

<sup>4</sup> Gus Brill is one of these employees. He was hired by the respondent in January 1937, laid off in April 1937, and rehired on May 5, 1937. Adolph Hutzenlaub and Albert Fischer were the other two employees who possessed less seniority than Schmocker on May 8, 1937.

One week after his discharge Schmocker found other employment earning a substantially higher salary. Schmocker also testified that he does not wish to return to his former position.

Although there is a conflict of the testimony concerning the circumstances surrounding Schmocker's discharge, the weight of the evidence convinces us that Schmocker was discharged because of his union membership and activity. We find that the respondent discharged Ernst Schmocker because of his union membership and activity and thereby discriminated in regard to his hire and tenure of employment in order to discourage membership in a labor organization and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

*C. The lay-off of Adolph Hutzenlaub and Albert Fischer*

*Adolph Hutzenlaub* and *Albert Fischer*, employees in the manufacturing department, were laid off on May 28, 1937.<sup>5</sup> They were not active in union affairs, but they were conspicuous when they refused to sign the statement of May 13, 1937, prepared by Minder, Sr., dealing with Schmocker's discharge. The Union claims that their lay-off was due to union activities. In support of this contention, Fischer testified that at the time of the lay-off Kuffer stated to him, "Mr. Minder has no fight with the Union but you two fellows talk too much about the Union. We have too much union talk around here." However, Hutzenlaub and Brill, who were laid off at the same time and who were the only other employees present, testified that no reference was made to union activities when Kuffer laid them off.

The respondent asserted that the lay-off of the two men was due to Dr. Staub's orders and the slowness of the business, and that the men were laid off in accordance with seniority. The evidence supports this contention in that Hutzenlaub, Fischer, and Brill were employees having the least seniority in the plant on that date.

On June 29, July 5, and July 21, 1937, the respondent hired three new employees. Minder, Sr., testified that he did not attempt to offer reemployment to Hutzenlaub and Fischer in preference to the men employed because he knew they had secured other employment.<sup>6</sup>

We are not convinced that the respondent in laying off Hutzenlaub and Fischer was motivated by their union activities. We find that the respondent in laying off these men did not discriminate against them because of their union membership and activity and the allegations of the complaint with respect to them will be dismissed.

<sup>5</sup> Gus Brill, an employee, was also laid off at the same time. However, Brill was not a member of the Union nor is it claimed that his lay-off was a discriminatory lay-off within the meaning of the Act.

<sup>6</sup> Hutzenlaub secured employment the day following his lay-off and Fischer secured employment within two weeks of his lay-off. They both testified that they did not wish to be reinstated.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the respondent set forth in Section III above occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. THE REMEDY

The Board has found that the respondent's discharge of Ernst Schmocker constituted an unfair labor practice within the meaning of Section 8 (3) of the Act. In order to restore the status quo, Schmocker ordinarily would be entitled to reinstatement and back pay. However, he has indicated that he does not wish to be reinstated, having secured employment elsewhere. We shall therefore only order the respondent to award back pay to Schmocker from the date of his discharge to the date of his employment elsewhere.

On the basis of the foregoing findings of fact and upon the entire record in the proceeding the Board makes the following:

## CONCLUSIONS OF LAW

1. Butchers Union, Local No. 174, of the Amalgamated Meat Cutter & Butcher Workmen of North America, affiliated with the American Federation of Labor, is a labor organization within the meaning of Section 2 (5) of the Act.

2. The respondent by discriminating in regard to hire and tenure of employment of Ernst Schmocker, and thereby discouraging membership in the Union, has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

3. The respondent by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

4. All the respondent's employees engaged in the manufacture of meat products, excluding supervisory employees, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

5. Butchers Union, Local No. 174 was on April 15, 1937, and at all times thereafter has been the exclusive representative of all employees in such unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

6. The respondent did not refuse to bargain collectively with the Butchers Union, Local No. 174 as the exclusive representative of the employees in such unit.

7. The respondent has not discriminated in regard to hire and tenure of employment by laying off Albert Fischer and Adolph Hutzenlaub on May 28, 1937, within the meaning of Section 8 (3) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

### ORDER

On the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that John Minder and Son, Inc., and its officers, agents, successors, and assigns shall:

1. Cease and desist:

(a) From interfering with, restraining or coercing its employees in the exercise of the rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act;

(b) From discouraging membership in Butchers Union, Local 174, or any other labor organization of its employees by discriminating in regard to hire or tenure of employment or any term or condition of employment.

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

(a) Make whole Ernst Schmocker for any loss of pay he may have suffered by reason of his discharge, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his discharge to the date of his securing other employment;

(b) Post immediately in conspicuous places throughout the plant notices to its employees stating that the respondent will cease and desist in the manner aforesaid;

(c) Maintain such notices for a period of at least thirty (30) consecutive days from the date of posting;

(d) Notify the Regional Director for the Second Region in writing within ten (10) days from the date of this order what steps the respondent has taken to comply herewith.

It is further ordered that the complaint be, and it hereby is, dismissed in so far as it alleges that the respondent has engaged in unfair labor practices by refusing to bargain collectively with the Union and by its lay-off of Adolph Hutzenlaub and Albert Fischer on May 28, 1937.