

1. All full-time and regular part-time¹³ meat department employees in the Employer's stores Nos. 17 and 41 in Lancaster, Pennsylvania, excluding all grocery, produce, office employees, cashiers, watchers, and supervisors as defined in the Act.

2. All full-time and regular part-time¹⁴ meat department employees in the Employer's stores Nos. 5, 12, 27, and 43 in York, Pennsylvania, excluding all grocery, produce, office employees, cashiers, watchers, and supervisors as defined in the Act.

[Text of Direction of Elections omitted from publication.]

Board policy. In the absence of a contrary bargaining history or a request by a labor organization for a more comprehensive unit, the Board has recognized the appropriateness of a separate meat department unit in stores of this kind. *The Great Atlantic and Pacific Tea Company, Inc.*, 130 NLRB 226, 227-228; 128 NLRB 342.

¹³ The parties stipulated that, in the event the Board directs an election in this case, all regular part-time employees shall be eligible to vote.

¹⁴ See footnote 13 *supra*.

American Stores Packing Co., Acme Markets, Inc. and International Union of Operating Engineers, Local No. 1, AFL-CIO.
Case No. 27-CA-1182. May 23, 1963

DECISION AND ORDER

On November 29, 1962, Trial Examiner Howard Myers issued his Intermediate Report in the above-entitled case, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Respondent and General Counsel filed exceptions 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 Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modifications.

The Trial Examiner found, and we agree for the reasons stated by him, that the Respondent violated Section 8(a) (5) and (1) of the Act by refusing to bargain in good faith with the Union. The Trial Examiner also found that the Respondent unlawfully locked out its employees on February 23, 1962, in violation of Section 8(a) (3) and (1) of the Act. We agree. We are, however, unable to agree with the Trial Examiner that such lockout continued until April 9, 1962, when the employees were returned to work, and with his Recommended Order that the employees be awarded backpay for the full period during which they were not working.

142 NLRB No. 81.

At the bargaining session beginning the evening of February 22, the Union announced that it would strike at midnight of February 25, unless in the interim negotiations made substantial progress or a contract was signed. No further progress was made in the negotiations by February 25 and for a period thereafter. On the morning of February 23, the Respondent refused to permit the employees to work, but told them to return on their regular shifts the following Monday, February 26, unless they were otherwise engaged in strike or picketing activity at that time.¹ However, the employees and the union representative, on the afternoon of February 23, decided not to return until all were called back by the Respondent, and further they decided to picket the plant. To protest the lockout, picketing did in fact commence that day and continued April 2. Consequently, on Monday none of the employees returned to work. On March 22, however, the Union unconditionally requested that the employees, none of whom was ever replaced, be reinstated. The Respondent refused, taking the position that the men could not return to work until a contract was signed. And it was not until after a contract was signed, on April 5, that the employees were permitted to return to work.

On the basis of the foregoing, we conclude that it was the employees' decision to picket the plant and not to work, and that it was not the Respondent's conduct, in refusing to permit them to work on February 23, which caused their absence from work during the period from February 26 to March 22. We are mindful that the picket signs stated that the employees were "locked out." It is clear, however, as stated above, that Respondent would have permitted them to work on and after February 26, but instead it was the employees who decided to carry out their earlier threats to strike and thus not to return to work. In these circumstances, we believe and find that their absence from work during the period from February 26 to March 22 was voluntary, and not caused by the Respondent. Accordingly, they are not entitled to backpay on account of such absence. The Respondent's refusal to reinstate them on March 22 was, however, clearly unlawful,² and they are therefore entitled to backpay from that date until April 9, 1962, the date of their reinstatement.³ We shall modify the Trial Examiner's Recommended Order accordingly.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner, with the following modification: ⁴

¹ The Trial Examiner found that two employees were in fact told they were laid off until further notice. However, the Respondent's position, unequivocally communicated to the other 14 employees in the unit including the union steward, was that they were to return on February 26 barring a strike or picketing.

² See *Fred H. Johnson, doing business as Atlas Linen and Industrial Supply*, 130 NLRB 761, 762.

³ The employees are not entitled to any backpay for the period from February 23 to 26 as they were in fact paid for this period.

⁴ For the reasons set forth in the dissent in *Ists Plumbing & Heating Co.*, 138 NLRB 716, Members Rodgers and Leedom would not grant interest on backpay.

(1) Section 2(a) of the Order shall be changed to read as follows:

Make whole all the employees represented by the Union for any loss of pay they may have suffered by reason of the unlawful refusal to reinstate them on March 22, 1962, in the manner and to the extent set forth in the section of the Intermediate Report entitled "The Remedy," as modified by the Decision herein.

(2) The third indented paragraph of the Notice shall be changed to read as follows:

WE WILL make whole all our employees represented by the Union for any loss of pay they may have suffered as a result of our unlawful refusal to reinstate them on March 22, 1962, together with interest at the rate of 6 percent per annum.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon a charge duly filed on February 23, 1962, by International Union of Operating Engineers, Local No. 1, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel¹ and the Board, through the Regional Director for the Twenty-seventh Region (Denver, Colorado), issued a complaint, dated April 13, 1962, against American Stores Packing Co., Acme Markets, Inc.,² herein called Respondent, alleging that Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended from time to time, 61 Stat. 136, herein called the Act.

Copies of the charge and complaint, together with notice of hearing thereon, were duly served upon Respondent, and copies of the complaint and notice of hearing were duly served upon the Union. On May 9, 1962, the General Counsel served upon the parties copies of "Notice of Intention to Amend the Complaint." Prior to the introduction of any evidence the General Counsel moved to amend the complaint pursuant to the aforesaid notice to amend. The motion was granted without objection.

Respondent duly filed an answer, dated April 20, 1962, denying the commission of the unfair labor practices alleged. At the hearing, Respondent's answer was amended to deny the allegations contained in the aforementioned amendment to the complaint.

Pursuant to due notice, a hearing was held on May 23, 24, and 25, and on July 10, 11, and 12, 1962, at Pueblo, Colorado, before Trial Examiner Howard Myers. Each party was represented by counsel who actively participated in the hearing. Full and complete opportunity was afforded the parties to be heard, to examine and cross-examine witnesses, to present evidence pertinent to the issues, to argue orally at the conclusion of the taking of the evidence, and to submit briefs on or before August 3, 1962.³ Each party filed a brief. Said briefs have been carefully considered.⁴

Upon the entire record in the case and from his observation of the witnesses, the Trial Examiner makes the following:

¹ This term specifically includes counsel for the General Counsel appearing at the hearing.

² Since the issuance of the complaint in the instant proceeding, the corporate name of Respondent was changed as above set forth.

³ At the request of Respondent's counsel the time to file briefs was extended to August 27, 1962.

⁴ After the close of the hearing, Respondent's counsel moved to correct certain inaccuracies appearing in the stenographic report of the hearing. The motion is hereby granted and the motion papers, copies of which were duly served upon the General Counsel and upon the Union's counsel, are received in evidence as Trial Examiner's Exhibit No. 2

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS OPERATIONS

Respondent, a Delaware corporation, has its principal offices at Philadelphia, Pennsylvania, where it is, and during all times material was, engaged in the processing, sale, and distribution of goods through plants and retail stores, including a slaughtering and packinghouse located in Pueblo, Colorado, the employees of which are the only ones involved in this proceeding.

During the 12-month period immediately preceding the issuance of the complaint herein, Respondent, in the conduct of its business at its Pueblo, Colorado, plant purchased, for resale, from points located outside the State of Colorado, goods valued at more than \$50,000.

Upon the basis of the foregoing facts, it is found, in line with established Board authority, that Respondent is engaged in, and during all times material was engaged in, business affecting commerce within the meaning of Section 2(6) and (7) of the Act and that its operations meet the standards fixed by the Board for the assertion of jurisdiction.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization admitting to membership employees of Respondent.

III. THE UNFAIR LABOR PRACTICES INVOLVED

A. Prefatory statement

Respondent's Pueblo, Colorado, plant employees here involved are 4 or 5 stationary engineers, who operate the plant's boilers and the refrigeration equipment, and 11 maintenance employees, who take care of the plant's mechanical and electrical equipment.⁵

The Union has represented the employees in the aforesaid engineers and maintenance unit since about 1946, and Respondent and the Union have been since that time in continual contractual relations.

From 1946 up to the time in 1962 when the incidents herein occurred, Respondent and the Union enjoyed harmonious relationships; there were no strikes or work stoppages or threats of the same.

Since 1954, William Schwabe, Respondent's assistant plant manager, has been the chief negotiator on behalf of Respondent in its contract dealings with the Union, and since 1956, Ralph Diltz, the Union's recording-financial secretary and business representative, has been the chief negotiator on behalf of the Union in its contract dealings with the Respondent.

The 1960 negotiations between Respondent and the Union were lengthy and ran beyond the expiration date of the then current contract. Because the contract had expired during the negotiation period, Respondent requested that the contract be extended. The Union refused this request and until a new contract had been entered into, the parties operated on a day-to-day basis. Respondent, however, maintained wages and benefits on a status quo basis.

Sometime during the 1960 negotiations, W. E. Magruder, regional director of region No. 9 of the Union's parent organization, entered into the picture as the Union's chief negotiator, and after a 60-hour negotiation session, a 2-year contract was agreed upon between the parties.

At the time the 1960 contract was concluded, the parties exchanged two side letters of agreement. The first letter related to an employee, Joe Boitz, an operating engineer, and, in addition, set forth that the health and welfare provisions provided for in the contract would not be operative during the first year of said contract. The second letter set forth the work that could be performed by Respondent's chief of maintenance who is a management employee. Thereafter, the Union took the position that a third side letter of understanding with respect to shift rotation had been agreed upon during the contract negotiations. Respondent maintained, on the other hand, that no such agreement had been reached. Thereupon, the Union filed a grievance and demanded arbitration on the point. Upon the Respondent's refusal to enter into arbitration, the Union filed an action in the Colorado State court to compel Respondent to arbitrate the issue. This State court action was still pending at the time of the hearing.

⁵ At said plant, Respondent also employs between 175 and 200 persons who are, and during times material were, represented by the Amalgamated Meat Cutters and Butcher Workmen of America, AFL-CIO, herein called Meat Cutters.

B. *The refusal to bargain; the lockout*1. The pertinent facts ⁶

By letter dated November 28, 1961, the Union served upon Respondent a notice of intention to reopen the then current contract which was, by its terms, to expire on February 2, 1962.⁷ Enclosed in said letter was a list of 25 union proposals. The letter, together with the proposals, was turned over by Dr. Frank W. Blamey, the manager of the Pueblo plant and to whom the letter was addressed, to Schwabe, as Respondent's chief negotiator.

The first bargaining session between the parties took place on December 20, 1961. The first eight proposals of the Union were discussed at that meeting, which lasted for about 2 hours.

The parties met again on December 28, 1961, and on January 3. Discussions at these two meetings centered around the remaining union proposals.

At the close of the January 3 meeting, Schwabe stated that he would study the Union's proposals further, check them against the provisions of the collective-bargaining contracts which the Big Four packinghouses⁸ then had, and then submit to the Union Respondent's counterproposals.

Between January 3 and 17, the date of the fourth negotiating meeting, Schwabe busied himself with the examination of the contracts which Armour, Swift, Wilson, and Cudahy had with the Meat Cutters Union and conferring with management people in the industry, including Joe McCabe, the chief negotiator for the Rocky Mountain Employers' Council, one of the principal employers' councils in the Denver area. Schwabe also, during this January 3 to 17 period, conferred with the members of Respondent's negotiating committee.

At the opening of the January 17 meeting Respondent, through Schwabe, submitted to the Union 11 counterproposals. Schwabe then read to those present these proposals and explained his interpretation of each. At the conclusion of Schwabe's remarks, the meeting adjourned for the evening meal. Before adjourning, Diltz, the Union's negotiator, stated that he and the members of his committee would study the counterproposal during the recess, which they did.

When the parties reconvened on the evening of January 17, some discussion was had with respect to Respondent's proposals numbered 2 through 8. The Union representatives, after inquiring whether Respondent's proposals were its complete counterproposals and receiving an affirmative answer, stated that the "major portion" of the said proposals were unacceptable to them. In fact, only the clause granting 3 weeks' vacation after 10 years of service was acceptable. After some further discussions, Diltz asked Schwabe whether Respondent was "rejecting the balance of" the Union's proposals. Schwabe replied, "It was the Union's turn to give [Respondent] another proposal." Thereupon, Diltz announced that he would submit Respondent's proposals to the membership for its consideration at its next monthly meeting which was scheduled to be held on the night of January 22. The meeting concluded with the understanding that the parties would meet again on January 24.

At the January 22 union meeting, the membership voted to reject Respondent's proposals. The membership, before adjourning, also voted "the Committee" strike authorization.

On January 24 the fourth negotiating meeting was held. At the opening thereof Diltz stated that at the January 22 union meeting the membership had rejected Respondent's proposals. After some discussion had been had with respect to the Union's proposals and those of Respondent, and when it became apparent to Diltz

⁶ In the light of the Trial Examiner's observation of the conduct and deportment at the hearing of all the persons who testified herein, and after a very careful scrutiny of the entire record, all of which has been carefully read and parts of which have been reread and rechecked several times, and being mindful of the contentions of the parties with respect to the credibility problems here involved, of the fact that in many instances testimony was given regarding events which took place months prior to the opening of the hearing, and of the fact that very strong feelings have been generated by the circumstances of this case, coupled with the fact that it would unnecessarily protract this report to summarize all the testimony or to spell out fully the confusion and inconsistencies therein, the following is a composite picture of all the factual issues involved and the conclusions based thereon. The parties may be assured that in reaching all resolutions, findings, and conclusions herein by the Trial Examiner, the record as a whole has been carefully considered; relevant cases have been studied; and each contention advanced has been weighed, even though not specifically discussed.

⁷ Unless otherwise noted, all dates hereinafter mentioned refer to 1962.

⁸ Such as Armour, Swift, Wilson, and Cudahy.

that there seemed little likelihood of the parties coming to any quick agreement on a contract, Diltz suggested that the Federal Mediation and Conciliation Service be called in. Schwabe, after expressing his regrets that a third party should be called upon, acquiesced to Diltz' suggestion. The meeting concluded with the understanding that Diltz would contact the Mediation Service and request it to set up a meeting and have one of its mediators present at said meeting.

The next day, January 25, Diltz telephoned Steve Halligan, a mediator attached to the Denver office of the Mediation Service, and requested him to set a date for a meeting with Respondent and the Union. Later the same day, Halligan telephoned Diltz and stated that he had contacted Respondent and had arranged for a meeting to be held on February 13. Diltz informed Halligan that that date was acceptable to him.

On February 1, Blamey telephoned Halligan and inquired when a meeting would be held. During the course of this telephonic conversation, Halligan stated that he knew nothing of the situation at Respondent's plant; that, although he and Diltz had been together in the last few days, Diltz had not mentioned anything to him about any bargaining negotiations between Respondent and the Union; that he would contact Diltz immediately and attempt to arrange a date for a meeting; and that he would advise Respondent the following day regarding said date.

On February 2, the day the then existing bargaining contract expired, Halligan telephoned Schwabe and stated that he had contacted Diltz, but he and Diltz had not been able to agree upon a date for a negotiating meeting within the near future because of Diltz' other commitments. During the course of said telephonic conversation, Halligan stated that Diltz had informed him that the Union had voted strike authorization and that he (Halligan) "would not be surprised if the Union would strike at any time."

Halligan had arranged to be present at the meeting which he had set for February 13. Halligan, however, was unable to attend said meeting because of his wife's illness. Nonetheless, Respondent and the Union met on said date without Halligan or any other mediator being present. At this meeting the Union dropped some of its demands, including its demand for a change in the phraseology of the recognition clause and its demand that Respondent "check-off weekly service dues for temporary employees."

Early on the morning of February 19, Schwabe instructed Assistant Plant Engineer Hunt to request Forrest Watkins and a few other employees who had attended prior negotiating meetings as union committee members to meet with him (Schwabe) at the plant that afternoon. Hunt thereupon selected, in addition to Watkins, employees Hower, Gardner, and Weimer. With the exception of Weimer, all the others had attended negotiating meetings as members of the union committee.

At the meeting referred to immediately above, which was attended by the aforementioned four employees and by Schwabe, Blamey, Hunt, Chief Engineer Richard Jameson, Plant Superintendent Robert Wilson, and Purchasing Agent Hal Huenick, Schwabe, the main spokesman for Respondent, after remarking that the meeting was called not for the purpose of negotiating a bargaining contract but merely for the purpose of presenting the facts regarding the status of the negotiations then in progress with the Union and the fact that Respondent always had treated its employees fairly, went over each proposal Respondent had submitted to the Union. At the conclusion thereof, Schwabe stated that: said proposals were as good or better than those contained in the Denver area contracts which the Big Four packers had entered into that morning;⁹ Respondent was anxious to enter into a contract with the Union embodying the same terms contained in the Big Four contract; the proposed wages and fringe benefit clauses proposed by Respondent were equal to, or better than, those contained in the Denver area contracts; the contract which United Fryer and Stillman,¹⁰ a Denver packinghouse, had recently entered into with the Union did not contain any provisions for premium pay for work performed on Saturdays and Sundays; Respondent's proposed pension plan was better than those of certain other packinghouses; and Respondent always had "followed" the contracts negotiated by the Big Four packers and it would like to continue to do so. Blamey then interjected that Respondent had to compete with other packers and hence had to consider the economic terms contained in the bargaining contracts of its competitors. At the conclusion of the meeting, which lasted about 45 minutes, Schwabe requested that the employees present talk over what he had told them with the other men represented by the Union.

⁹ Namely, Armour, Wilson, Swift, and Cudahy.

¹⁰ Also referred to in the record as Fryer and Stillman.

The next bargaining conference between the parties was held on February 21. This meeting was attended by Pete Nichols, a mediator attached to the Denver office of the Mediation Service. During the course of this meeting, Nichols was given a copy of the Union's proposals and a copy of Respondent's proposals. Nichols then asked the parties to state and discuss their relative positions regarding the proposals submitted by them, which they did. Nichols not only conferred with the parties in joint sessions, but also conferred with them separately.

At the meeting referred to immediately above, the Union withdrew (1) its proposal that the "no-strike, no-lockout" clause contained in the expired contract be not made a part of any new contract, (2) its proposal for the inclusion in any new contract a clause permitting the Union "to strike if any term or provision of [the new] contract is breached by" Respondent, (3) its proposal that the grievance procedure clause contained in the expired contract be not made a part of any new contract, and (4) its proposal that the discharge clause contained in the expired contract be not made a part of any new contract.

At the aforesaid February 21 meeting, the Union requested that the parties, as was their past custom, negotiate along the lines of the contracts which were then in existence between the Union and the Denver area packinghouses owned by chain-stores.¹¹ Respondent, however, refused the Union's request and insisted upon the parties negotiating along the lines of the Big Four packer's contracts.

About 4:30 p.m. on Thursday, February 22, Nichols and the representatives of the Union and of Respondent again met. Thereat, Schwabe stated that he had contacted Respondent's head office, located at Philadelphia, Pennsylvania, and had been instructed to negotiate a bargaining contract along the terms of the then existing Big Four packers' contracts. Schwabe also stated that he would give Respondent's position to each of the Union's proposals. He then proceeded to orally go over the Union's proposals, item by item. At the conclusion thereof, Schwabe announced his disapproval of each of said proposals. After some further discussion, a recess was taken for dinner.

Shortly after the parties and Nichols had reconvened on the night of February 22, Schwabe again discussed each of the Union's proposals and counterproposals; gave "Respondent's position thereon [and rejected] them as he went along."

Toward the close of the night session of the February 22 meeting, the Union suggested that the parties meet again the following day, and the 2 days thereafter if necessary, in order to agree upon a bargaining contract. Schwabe replied that if the Union "were willing to negotiate within the area outlined by the Company they were willing to meet. If [the Union was] willing to negotiate only on the Union proposal it would be a waste of time to meet . . ." ¹² The Union's spokesman, Diltz, replied that the Union wanted to continue to negotiate and wanted to do so upon the basis of the Union's proposals and those of Respondent. When Schwabe replied that there was no use discussing the Union's proposals at all, the union committee recessed to discuss what steps should be taken by the Union under the circumstances.

Upon returning to the bargaining table after the above-referred-to recess, Diltz stated that if no bargaining agreement was reached by midnight Sunday, February 25, the Union would call a strike. Said strike threat was made, to quote from the credible testimony of Diltz, who particularly impressed the Trial Examiner as being one who is careful with the truth and meticulous in not enlarging his testimony beyond his memory of what was said,¹³ "in order to get the Company back into bargaining on the Union proposal as well as their own." Diltz credibly testified further that when it became obvious to him that Respondent would not recede from its position of not considering the Union's proposals and insisting upon negotiating only on the basis of its own proposals, he inquired if Respondent "wanted the moving equipment shut off, refrigeration pumped down and shut off or if they just wanted everything left running" in case the Union struck. Schwabe

¹¹ Commonly called supermarkets, of which Respondent is one.

¹² As of the February 22 meeting the Union had dropped five of its proposals and had changed the wording of five others of its proposals.

¹³ This is not to say that at times Diltz was not confused on certain matters or that there were no variances in his objectivity and convincings. But it should be noted that the candor with which he admitted, during a long and searching examination, that he could not be certain as to certain dates or the exact words used and that he had to refer to certain notes which he had made at the bargaining conferences in order to refresh his recollection concerning certain questions asked him, only serves to add credence to what a careful study of his testimony shows what he honestly believed to be the facts.

replied that if the plant should be running at Sunday midnight, it was to be left running and left shut down if it was shut down at that time.

Between the time of the close of the February 22 meeting and 7 o'clock the following morning, Respondent decided to relieve the employees represented by the Union of their duties.

When Job Steward James Sieling and several other employees in the unit represented by the Union reported for work on February 23, shortly before the beginning of the first shift, which normally began at 7 a.m., they were informed by the plant guard to report to the conference room. When all the first-shift maintenance department employees, these persons being within the unit represented by the Union, had assembled in the conference room, Schwabe, Blamey, Plant Superintendent Robert Wilson, and several other plant representatives entered. Schwabe opened the meeting by announcing that the meeting was not a negotiating meeting nor did it have anything to do with bargaining. Schwabe then stated that: Respondent "was going to take over the plant"; he saw no need for any further bargaining conferences with the Union since the Union did not want to play in Respondent's "ball park"; the employees represented by the Union were forthwith relieved of their duties; if there was no strike by Sunday midnight, the employees involved would be expected to return to work Monday, February 25, or their absences would be inexcusable; and the men would be paid in accordance with the 36-hour weekly guarantee clause of the expired contract. The assembled employees were then requested to leave the plant.

At the time of the meeting referred to immediately above, 6 of the 15 or so employees represented by the Union and who normally worked on shifts other than the first, were not present at said meeting. Shortly after the conclusion of said meeting, Wilson telephoned five¹⁴ of said six employees. Wilson told Smith and Gardner, in general terms, what Schwabe had said at the meeting that morning. However, in his telephone conversation with Weimer, Wilson merely told him that contract negotiations had broken down and therefore Weimer was being "indefinitely laid off until this thing was settled," that he was not to report for work until notified to do so by Respondent, and that he would be paid in accordance with the expired contract.

In his February 23 telephone conversation with Olivas, Wilson told Olivas that he was relieved of his duties for the balance of the week; that Olivas should report for work Monday morning, provided a contract had been executed over the weekend and the plant was not picketed; and that Olivas would be paid in accordance with the expired contract.

Wilson, in his February 23 telephone conversation with Watkins, stated that negotiations had broken down; that Respondent believes that Diltz was poisoning the men's minds against the Company; that Respondent was taking over the plant; that Watkins should not report for work until notified to do so by Respondent; and that Watkins would be paid in accordance with the expired contract.

Upon leaving the above-referred-to February 23 meeting with Schwabe, Job Steward Sieling telephoned Diltz, who was in Denver. However, it was not until about 9 o'clock that morning that Sieling was able to reach Diltz. Sieling told Diltz about Schwabe's remarks at the aforesaid meeting. Diltz stated that he would leave for Pueblo as soon as he could. After concluding the aforesaid telephone conversation with Diltz, Sieling commenced calling the men represented by the Union requesting them to come to his home at 2 o'clock that afternoon.

About 1 o'clock that afternoon, February 23, Diltz arrived at Sieling's home. There they discussed the situation, decided that Respondent had locked out the men represented by the Union, that the plant should be picketed, and then proceeded to prepare picket signs, which bore the legend: "Locked out. American Stores Unfair to Engineers Local Union No. 1."

About 12 or 13 of the 15 or so employees in the unit represented by the Union arrived at Sieling's home about 2 o'clock that afternoon, February 23. At this meeting, which lasted about 1½ hours, Diltz and Sieling discussed with said men Respondent's decision to take over the plant and to relieve the maintenance department employees of their jobs. Those assembled then unanimously decided that since Respondent had taken "group action," they would return to work only as a group. They also unanimously decided to picket Respondent's plant, commencing at 4 o'clock that afternoon. Said picketing started as scheduled and continued until April 2.

¹⁴ Namely, Joe Olivas, Robert Weimer, Forrest Watkins, George Smith, and Ernest Gardner.

On March 5, Respondent's representatives and those of the Union met for the first time since February 22. Respondent refused to proceed with the meeting until it had a chance to seek advice from its Philadelphia, Pennsylvania, office, because the Union had in attendance Fermin Martin, a representative of the Laborers Union, and a man named Burton, a representative of the Pueblo Building Trades Council. Because of said refusal to proceed, the parties decided to adjourn the meeting until the following day.

The following day, March 6, Respondent's spokesman advised the Union, in Nichols' presence, that Respondent had no objection to Martin and Burton sitting in. However, Martin and Burton had already left town. Nichols' attempts to bring the parties to contract terms were unsuccessful. Respondent continued to refuse to recede from its original proposals and the Union offered no further concessions.

On March 14, Nichols met with representatives of Respondent and those of the Union. Thereat, Schwabe announced that the employees represented by the Union would not be permitted to return to work until a collective-bargaining contract had been signed. Schwabe also stated that Respondent would not enter into any bargaining contract unless the Union first withdrew the charge it had filed with the Board. Despite Schwabe's remarks regarding the withdrawing of the unfair labor practice charge before the men would be permitted to return to their jobs, the parties, in fact, did discuss Respondent's proposals. However, no discussion was had with respect to the Union's proposals because Respondent's representative refused to discuss said proposals, contending that it would be of no avail because they would not agree to any of said proposals. In fact, Blamey stated, to quote from Diltz' credible testimony, "we could sit [here] until hell freezes over and [Respondent] would not agree to any of [the Union's] proposals." Blamey then asked why agreement could not be reached on the real important issues, such as wages and the like. The Union representatives replied that an adjournment should be taken in order to allow them to revise the Union's proposals. An adjournment was then taken.

The next day, March 15, the parties again met with Nichols at which time the Union withdrew more of its original proposals. In fact, as Diltz credibly testified, the Union, as of March 15, "had cut" its "proposal way down, didn't have too much left in it." The Respondent, on the other hand, continued to refuse to change any of its proposals which it had submitted to the Union on January 17.

At this March 15 meeting, Respondent again insisted that all discussion be centered around its proposals. In addition, Schwabe again stated that the employees represented by the Union would not be recalled to work until a bargaining contract was completed and signed, adding that no bargaining agreement would be agreed to by Respondent until the charge which the Union had filed with the Board, alleging that Respondent had engaged in certain unfair labor practices, had been withdrawn.

On March 22, the parties and Nichols again met. At this meeting W. E. Magruder, a regional director of the Union's parent organization and the person who, in prior years, had represented the Union in some of its contract negotiations with Respondent, replaced Diltz as the Union's spokesman. Magruder, after some pleasantries had been engaged in between him and Blamey and Schwabe, requested that Respondent recall to work the employees represented by the Union. Respondent's representatives replied that the employees involved would not be put back to work until a bargaining contract had been agreed upon and executed and the charge which the Union had filed with the Board had been withdrawn. Nichols and others then gave Magruder a résumé of what had transpired at previous negotiating meetings. Before the meeting concluded, the Union informed Respondent that it was withdrawing four additional proposals.¹⁵ Despite these further concessions by the Union no agreement was reached.

On March 29, the parties again met with Nichols. Magruder, because of other commitments, did not attend. At the beginning of this meeting, Respondent's spokesman announced that Respondent is withdrawing its demands that the charge which the Union had filed with the Board be withdrawn before it would enter into a bargaining contract with the Union. It still refused, however, to permit any of the employees represented by the Union to return to work until a bargaining contract had been agreed to and executed. After some discussion regarding such items as wages, grievance procedure, and the like, the meeting concluded with the understanding that the parties would meet again on April 2.

By the time of the April 2 negotiating meeting, which was attended by Nichols and Magruder, the Union had completely dropped what remained of its proposals.

¹⁵ Namely, the Union's demands pertaining to (1) jury duty, (2) a guaranteed 40-hour workweek, (3) overtime, and (4) call-in time.

Agreement was then reached on the terms of Respondent's proposed bargaining contract. Magruder then requested Respondent to immediately recall to work the employees represented by the Union. Respondent replied that before said employees would be recalled a bargaining contract had to be actually signed. The parties then agreed to meet on April 5 for the purpose of drafting, proofreading, and signing a contract. Respondent then stated that the aforementioned employees would be recalled to their jobs on April 9, provided a bargaining contract had been executed by said date. A bargaining contract was, in fact, executed on April 5, and the employees were permitted to return to their respective jobs on April 9.

2. Concluding findings

The Board, with court approval, has repeatedly and uniformly held that it is the duty of an employer to enter into discussions with respect to a collective-bargaining contract with an open and fair mind, and with a sincere purpose to find a basis of agreement touching upon wages and other conditions of employment. Respondent's conduct in this regard fell far short of this standard.

Respondent failed utterly to discharge its statutory duty to bargain collectively in good faith with the Union as the representative of the employees whom he latter represented. The record leaves no doubt that at no time prior to the April 2 meeting, by which time the Union had completely withdrawn all its proposals, did Respondent approach the bargaining table with any sincere desire to arrive at a mutually acceptable contract. In short, at no time during its prolonged negotiations did Respondent entertain any intention of entering into an agreement with the Union except upon the proposals submitted by it. The fact that Respondent, prior to April 2, entered into the negotiations with a mind hermetically sealed against even the thought of entering into a bargaining agreement with the Union is evidenced, in part, by (1) its refusal to discuss any of the Union's proposals after the first few bargaining sessions, (2) its announcement that before any bargaining contract would be agreed to by Respondent, the Union had to play in Respondent's "ball park" and negotiate along the proposals submitted by it, (3) Blamey's remark at the March 14 bargaining meeting that the Union committee could sit there until "hell freezes over" before Respondent would agree to any contract terms proposed by the Union, (4) its oft-repeated demand for the withdrawal of the charge which the Union had filed with the Board on February 23, and which is the basis for the instant proceeding, before it would enter into a bargaining contract with the Union, and (5) its announcement that no employee represented by the Union would be recalled to work until a bargaining contract had been executed.

The credited evidence, as epitomized under section III, B, 1, above, leads the Trial Examiner to the inescapable conclusion that Respondent locked out the employees represented by the Union on February 23, for reasons proscribed by the Act. The Trial Examiner completely rejects the Respondent's contention that the aforementioned employees were relieved of their respective jobs when the Union threatened to strike at midnight on February 25, if no bargaining contract had been reached by said hour, because it feared that said employees, all of whom have been in Respondent's employ for many years, would sabotage the plant prior to the strike deadline and hence effect untold damage to Respondent's plant. Respondent introduced some testimony, most of which was clearly hearsay and hence of doubtful value as a basis for a finding, to support its sabotage-fear contention. This testimony consisted mainly of the following: The members of the Union had struck the Denver, Colorado, slaughterhouse of United Fryer and Stillman on or about February 1, 1962, and prior to going out on strike the union members employed at the United Fryer and Stillman plant had sabotaged the refrigeration of said plant, thereby causing United Fryer and Stillman a great financial loss. In addition, Schwabe testified that while the strike at the United Fryer and Stillman plant was in progress (February 1 to 10, 1962), he had telephoned Harry T. Cohen, the vice president and plant manager of United Fryer and Stillman, and was informed by Cohen that the United Fryer and Stillman's plant had been sabotaged and that he deduced from Cohen's statement and from other reports he had received, not only from certain respondent supervisors, but from persons not connected with Respondent, that the Union had sabotaged the United Fryer and Stillman plant. To rebut Respondent's testimony regarding the United Fryer and Stillman plant, as summarized above, the General Counsel called as his witness Cohen, an entirely disinterested third party, who testified that he could not recall having any conversation between February 1 and 23, 1962, with anyone connected with Respondent's Pueblo, Colorado, plant, and that he never, at any time, told anyone that the Union had sabotaged his plant. The Trial Examiner credits Cohen's testimony and rejects that

of Schwabe. This finding is based not only upon the entire record in the case, but also on the fact that Cohen particularly impressed the Trial Examiner as being an honest, forthright, and truthful witness.

Upon the entire record in the case, the Trial Examiner finds that at all times from December 20, 1961,¹⁶ to April 2, 1962, the Respondent refused to bargain in good faith with the Union as the exclusive statutory representative of Respondent's employees in the appropriate unit with respect to grievances, labor disputes, rates of pay, hours of employment, and other conditions of employment, and by such refusal, which is violative of Section 8(a)(5) of the Act, Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby violating Section 8(a)(1) thereof.

The Trial Examiner also finds, upon the record as a whole, that on February 23, 1962, Respondent locked out the employees represented by the Union for reasons proscribed by the Act, thereby violating Section 8(a)(3) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1), (3), and (5) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent on February 23, 1962, locked out all the employees represented by the Union and did not recall them until April 9, 1962, it will be recommended that Respondent make said employees whole for any loss of pay they may have suffered by reason of the aforesaid Respondent's discriminatory action against them, by payment to each of them of a sum of money equal to the amount each would have normally earned as wages during the period from February 23, 1962, to April 9, 1962, together with interest at the rate of 6 percent per annum on said amount to be computed and paid in the manner set forth in *F. W. Woolworth*, 90 NLRB 289, and in *Isis Plumbing & Heating Co., Inc.*, 138 NLRB 716, less his net earnings during said period.

The unfair labor practices found to have been engaged in by Respondent are of such a character and scope that, in order to insure Respondent's employees of their full rights guaranteed them by the Act, it will be recommended that Respondent cease and desist from in any manner interfering with, restraining, and coercing its employees in their right to self-organization.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.
2. Respondent, at Pueblo, Colorado, during all material times was engaged in, and now is engaged in, commerce within the meaning of Section 2(6) and (7) of the Act.
3. At all times material herein, all Respondent's Pueblo, Colorado, plant shift engineers, relief engineers, machinists, welders, pipefitters and steamfitters, electricians, boilerroom and engineroom employees, mechanical maintenance employees, oilers, and general helpers, excluding supervisors as defined by the Act, constituted, and now constitute, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. At all times material herein, the Union has been, and now is, the exclusive collective-bargaining representative of all the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.
5. By refusing, from December 20, 1961, until April 2, 1962, to bargain collectively with the Union as the exclusive representative of all the employees in the afore-

¹⁶ The date of the first meeting between the parties looking toward a collective-bargaining contract.

said appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By discriminating in regard to the hire and tenure of all its employees in the above-described appropriate unit from February 23, 1962, to April 9, 1962, thereby discouraging membership in the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By locking out the employees represented by the Union and by otherwise interfering with, restraining, and coercing its employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that Respondent, American Stores Packing Co., Acme Markets, Inc., Pueblo, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Locking out any of its employees for reasons proscribed by the Act or in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist the Union or any other labor organization of its employees, 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, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

(b) Refusing to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit: All Respondent's Pueblo, Colorado, plant shift engineers, relief engineers, machinists, welders, pipe fitters and steam-fitters, electricians, boilerroom and engineroom employees, mechanical maintenance employees, oilers, and general helpers, excluding supervisors as defined by the Act.

(c) Discouraging membership in the Union by locking out the employees represented by the Union or by discriminating in any manner in regard to their hire or tenure of employment or any term or condition of their employment.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make whole all the employees represented by the Union for any loss of pay they may have suffered by reason of being locked out of Respondent's Pueblo, Colorado, plant from February 23, 1962, until April 9, 1962, in the manner and to the extent as set forth in the section of this Intermediate Report and Recommended Order entitled "The Remedy."

(b) Post in its establishment at Pueblo, Colorado, copies of the attached notice marked "Appendix."¹⁷ Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being duly signed by Respondent, be posted for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Twenty-seventh Region, in writing, within 20 days from the receipt of this Intermediate Report and Recommended Order, what steps Respondent has taken to comply therewith.¹⁸

¹⁷ In the event that this Recommended Order be adopted by the Board, the words "Pursuant to a Decision and Order" shall be substituted for the words "Pursuant to the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "Pursuant to a Decision and Order."

¹⁸ In the event that this Recommended Order be 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, we hereby notify our employees that:

WE WILL NOT unlawfully lock out any of our employees or in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Union of Operating Engineers, Local No. 1, AFL-CIO, or any other labor organization, 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, or to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act.

WE WILL NOT refuse to bargain collectively with the above-named labor organization as the exclusive representative of all the employees in the unit which has been found to be appropriate with respect to grievances, labor disputes, rates of pay, wages, hours of employment, and other conditions of employment.

WE WILL make whole all the employees whom we unlawfully locked out of our Pueblo, Colorado, plant from February 23, 1962, until April 9, 1962, for any loss of pay suffered by them as a result of our discrimination against them, together with interest at the rate of 6 percent per annum.

All our employees are free to become or remain members of the above-named Union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the amended Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

AMERICAN STORES PACKING CO.,
ACME MARKETS, 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.

Employees may communicate directly with the Board's Regional Office, 609 Railway Exchange Building, 17th and Champa Streets, Denver, Colorado, 80202, Telephone No. Keystone 4-4151, Extension 513, if they have any question concerning this notice or compliance with its provisions.

General Adjustment Bureau, Inc. and Insurance Workers International Union, AFL-CIO. Case No. 6-CA-2507. May 23, 1963

DECISION AND ORDER

On January 10, 1963, Trial Examiner Rosanna A. Blake issued her Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Respondent filed exceptions to the

142 NLRB No. 85.