

May 1963 contract. The primary purpose of the premature-extension rule is to protect petitioners in general from being faced with prematurely executed contracts at a time when the Petitioner would normally be permitted to file a petition. However, the Board's rule is not an absolute ban on premature extensions, but only subjects such extensions to the condition that if a petition is filed during the open period calculated from the expiration date of the old contract, the premature extension will not be a bar.⁵

As to the claim that less than 30 percent of the employee complement was employed at the time the contract was signed, we do not accept the Petitioner's contention that the actual date of the signing of the contract (May 1963) is the determinative date since it is clear that on January 18, 1964, when the parties agreed to apply the contract to the new facility, more than 30 percent of the employees were then employed in more than 50 percent of the job classifications.⁶

Finally, we reject Petitioner's claim that the contract clause in "Schedule B" stating that part-time employees will receive a pay increase "After 3 Months Service When Join Union" constitutes an unlawful union-security clause. We note that article 1 of the contract lawfully requires part-time employees to become and remain members of the Union after 3 months' service. As the related clause on wage increases in "Schedule B," while somewhat ambiguous, is not clearly unlawful when read in context with article 1, we find it does not remove the contract as a bar.⁷

We conclude, therefore, that Local 21's May 1963 contract became effective for contract-bar purposes on April 1, 1964. Accordingly, as the petition was filed after April 1, 1964, but more than 90 days prior to April 1, 1967, the terminal date of the May 1963 contract, we find that the contract is a bar to the present petition and we shall order the petition dismissed.

[The Board dismissed the petition.]

⁵ *Deluxe Metal Furniture Company*, 121 NLRB 995, 1001.

⁶ *General Extrusion Company, Inc.*, 121 NLRB 1165.

⁷ *Cf. Paragon Products Corporation*, 134 NLRB 662.

Safeway Stores, Incorporated and Levina McGinnis. *Case No.*
27-CA-1484. August 31, 1964

DECISION AND ORDER

On June 3, 1964, Trial Examiner Herman Marx issued his Decision 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 Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions with respect to the remedy recommended by the Trial Examiner and a brief in support thereof. The Respondent thereupon filed cross-exceptions, a brief in support thereof, and a brief in answer to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Leedom and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, and briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations¹ with the following additions and modifications:

The Trial Examiner concluded, and we agree, that the Respondent's Glenwood Springs, Colorado, market and the City Market store in that municipality had effectively merged their two separately certified meat department units into a multiemployer bargaining unit by virtue of their agreement with the Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 634, AFL-CIO, to enter into joint negotiations, and by virtue of the joint bargaining in which they engaged thereafter. Representatives of the two employers had also agreed that if the meat department of either store was struck, the other store would lock out its meat department employees.

During negotiations, employees in the meat department at City Market did, in fact, strike over economic issues on August 8, 1963. Shortly thereafter on that date, the Respondent notified its meat department employees to the effect that they were locked out. Upon completing the cleaning up of their department prior to leaving, several of these employees were warned by the Respondent's store manager and its district manager that anyone who picketed could be transferred to a "non-union" store and later terminated. The district manager requested that the meat department manager relay this information, and it was in fact relayed, to those employees whom the latter supervised and who were not present. During the period of the lockout, the Respondent's meat department was operated by management personnel brought from other areas but who are regularly in the Respondent's employ.

¹ No exceptions were filed to the Trial Examiner's findings, conclusions, and recommendations regarding the threats of transfer and of subsequent termination of locked-out employees who engaged in picketing or regarding the discharge of the Charging Party

The Trial Examiner concluded that the lockout, which may otherwise have been lawful as an appropriate defensive measure against the Union's "whipsaw" strike at City Market,² was violative of Section 8(a)(3) and (1) of the Act because of the above-noted unlawful threats which, in essence, according to the Trial Examiner, converted the character of the lockout from defensive to offensive.

We agree that the lockout was unlawful but not for the reason relied upon by the Trial Examiner. We find that the lockout, a tactic previously agreed upon by the multiemployer unit as a countermeasure against a "whipsaw" strike, was, at its inception, a lawful defensive lockout.³ We do not regard the threats, which were violative of Section 8(a)(1) of the Act, as having destroyed the defensive character of this lockout. We find, however, that the lockout lost its defensive character by virtue of the Respondent's operation of its meat department with management personnel replacing the regular employees. The Board has previously held, where nonstruck employers have locked out their regular employees but have continued to operate using temporary replacements, that the action of the nonstruck employers exceeds the lawful defensive limits established in *Buffalo Linen*, and that such lockout not only interferes with, restrains, and coerces employees in violation of Section 8(a)(1), but also constitutes discrimination in violation of Section 8(a)(3).⁴ Accordingly, we find the Respondent's lockout of its meat department employees was unlawful under Section 8(a)(3) and (1) of the Act.⁵

The Union and Companies entered into identical collective-bargaining agreements on September 18, 1963, in which it was stated in article 31: "Both parties and the employees waive all claims for all matters arising in the past." The Board has long held that such a waiver does not preclude individual employees from filing unfair labor practice charges.⁶ When such a charge has been filed, the Board is not precluded by the waiver from enforcing congressional policy.⁷

² *N.L.R.B. v. Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL (Buffalo Linen Supply Co.)*, 353 U.S. 87.

³ *Buffalo Linen Supply Co.*, *supra*.

⁴ *John Brown, Irvin L. Gossett and J. C. West, Jr., d/b/a Brown Food Store*, 137 NLRB 73. The Board has noted the Respondent's contention that this case is inapplicable because our decision in *Brown Food Store*, involving the same issue, was denied enforcement by the Tenth Circuit (*N.L.R.B. v. Brown Food Store*, 319 F.2d 7). On January 6, 1964, the Supreme Court granted the Board's petition for certiorari in that case (375 U.S. 962). With all due respect for the opinion of the Court of Appeals for the Tenth Circuit, the Board has determined to adhere to its decision in *Brown Food Store*, pending final resolution of the issue by the Supreme Court. See *The Kroger Company*, 145 NLRB 235; *Food Giant Super Markets Mayfair Markets, d/b/a El Rancho Markets Safeway Stores, Inc.*, 145 NLRB 1221, and *Bagdad Bowling Alleys*, 147 NLRB 851.

⁵ In view of this finding, Member Leedom would find it unnecessary to decide whether the Respondent's threats to its employees, in other circumstances, would have negated the defensive character of the lockout.

⁶ See *The Great Atlantic & Pacific Tea Company*, 145 NLRB 361.

⁷ See *The Great Atlantic & Pacific Tea Company*, *supra*.

Accordingly, we find that the waiver provision in the contract between the Union and the Respondent does not constitute a bar to our finding Respondent's lockout of its meat department employees to be violative of the Act.

THE REMEDY

The Trial Examiner concluded that, because of the presence of the waiver provision in the collective-bargaining agreement, it would be "equitable to dispense with the provisions for back pay reimbursement" with respect to the locked-out employees. We do not agree. In *The Great Atlantic & Pacific Tea Company* case, *supra*, involving a similar waiver provision, where the Board found that it would be inequitable to grant backpay, it did so *only* because in that collective-bargaining agreement the parties had explicitly agreed to an increase in wage rates as compensation for those employees who had suffered monetary losses as a result of the lockout. The Board there held that, should it make its usual backpay award, the employees would have been made whole more than once. In the instant case, it does not appear that wage increases were negotiated as compensation for monetary losses due to the lockout. Therefore, the employees who were victims of this discrimination, if denied backpay, would not be made whole for their monetary losses.

Accordingly, having found that the Respondent unlawfully discriminated against its meat department employees, we shall direct the Respondent to make them whole for any loss of pay they may have suffered by reason of such unlawful discrimination by the payment of a sum of money to each employee equal to that which he would have earned as wages during the period of discrimination,⁸ less any net earnings during said period. Backpay shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*,⁹ and *Isis Plumbing & Heating Co.*¹⁰

We shall, therefore, modify paragraph 2 of the Trial Examiner's Recommended Order as follows:

Paragraph 2(a) shall be modified to read:

(a) Make Levina McGinnis whole, together with interest, in the manner, according to the method, and to the extent set forth in section V of the Trial Examiner's Decision entitled "The Remedy."

Paragraphs 2(b), (c), and (d) shall be redesignated as paragraphs 2(c), (d), and (e).

⁸ This period shall run from the time each employee was locked out until reemployed or offered reemployment.

⁹ 90 NLRB 289, 291-294.

¹⁰ 138 NLRB 716

A new paragraph 2(b) shall be added and shall read :

(b) Make whole each of its employees who were locked out for any loss of earnings, together with interest, in the manner, according to the method, and to the extent set forth in the section hereof entitled "The Remedy."¹¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner as modified herein and orders that the Respondent, Safeway Stores, Incorporated, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order as modified herein.

¹¹ The notice is similarly amended by adding the following thereto

WE WILL make whole our employees for any loss of pay they may have suffered by reason of the lockout which occurred on August 8, 1963.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

The complaint alleges that the Respondent, Safeway Stores, Incorporated, herein called Safeway or the Company, "locked out its meat department employees" at a store operated by it in Glenwood Springs, Colorado, to discourage activities on behalf of Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 634, AFL-CIO, herein called the Union; subsequently discharged one such employee, Levina McGinnis, the Charging Party in this proceeding, because she had engaged in activities on behalf of the Union; and has by such conduct violated Section 8(a) (1) and (3) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, *et seq.*), herein called the Act.¹

The Respondent has filed an answer which, in material substance, denies the commission of the unfair labor practices imputed to it in the complaint; and asserts various affirmative defenses which will appear below in the course of consideration of the issues in this proceeding.

Pursuant to notice duly served upon each of the other parties by the General Counsel of the National Labor Relations Board, a hearing upon the issues in this proceeding has been held before Trial Examiner Herman Marx at Glenwood Springs, Colorado. The General Counsel and the Respondent appeared at the hearing through, and were represented there by, respective counsel. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to adduce evidence, to file a brief, and to submit oral argument. I have read and considered the respective briefs of the General Counsel and Respondent filed with me since the close of the hearing.²

¹ The complaint was issued on December 27, 1963, and is based upon a charge filed by Levina McGinnis with the National Labor Relations Board on November 7, 1963, and upon an amendment thereof filed with the agency on December 23, 1963. Copies of the complaint, the charge, and the amendment have been duly served upon the Respondent.

² The transcript of the hearing is garbled or otherwise erroneous at a number of points. For example, at page 123, lines 5 to 10, in the course of a colloquy with counsel, I am quoted as saying, "(w)e do not know" that the Board will defer to an arbitration result where "certain standards" are met, although what I said, in substance, was that "(w)e do know" that such is the case. The same page (lines 11 to 14) contains a garbled version of a statement made on the subject that Board members have differed in cases whether standards established by the Board for deference to arbitration results have been met, making it appear that remarks were made as to the relative frequency with which Board members "get together." This is a garbled and erroneous transcription of what was said concerning dissenting views in the application of the standards. Be that as it may, as the record adequately sets forth the material evidence and issues, I deem it unnecessary, particularly in the absence of a motion by any of the parties, to correct the transcript either in the respects indicated or at other points where correction would be appropriate.

Upon the entire record, and from my observation of the witnesses, I make the following findings of fact:

FINDINGS OF FACT

I. NATURE OF THE RESPONDENT'S BUSINESS; JURISDICTION OF THE BOARD

Safeway Stores, Incorporated, is a Maryland corporation; maintains its principal office in Oakland, California; is engaged in the business of selling and distributing food and other products at retail; in conjunction therewith operates a chain of stores in some 25 States, including Colorado; and is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act. The issues in this proceeding involve a store operated by Safeway in Glenwood Springs, Colorado.

In the course and conduct of its business Safeway "annually" sells and distributes through its Colorado stores food and other products valued in excess of \$500,000 and "annually" transports goods valued in excess of \$50,000 to its retail outlets in Colorado directly from points outside that State. By reason of such interstate transportation of merchandise, the Company, as it concedes in its answer, is, and has been at all material times, engaged in interstate commerce within the meaning of Section 2(6) and (7) of the Act. Accordingly, the National Labor Relations Board has jurisdiction of the subject matter of this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

As the complaint alleges, and the answer admits, the Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Prefatory statement

Safeway's Glenwood Springs store includes a separate department in which meat products are cut, wrapped, and sold. The meat department's staff normally consists of some six persons, including a manager, Martin Hotz, who is vested with authority to hire and discharge meat department personnel, and responsibly directs their work. He is subject to supervision by the store manager, Dale Shellman, who is supervised, in turn, by Safeway's district manager, Roger Halstead. The latter, whose headquarters are in Denver, has managerial responsibility for about a dozen of Safeway's stores. Hotz, Shellman, and Halstead are, and have been at all material times, supervisors within the meaning of Section 2(11) of the Act.

Glenwood Springs contains another retail chain food store which is operated by a firm named City Markets. This store includes a meat department, and competes with the Safeway store in the sale of meats and other food products.

In or about the latter part of November 1962, following a representation election, the National Labor Relations Board certified the Union as the bargaining representative of the nonsupervisory meat department employees of Safeway's Glenwood Springs store.

Similarly, on May 29, 1963, the Board, as a result of a representation election among nonsupervisory meat department employees of City Markets' Glenwood Springs store, certified the Union as the representative of these employees.

Following the Safeway certification, but before that affecting City Markets, the Union's secretary, George W. Dean, met on two occasions with a Safeway representative, Elmer B. Wynne, for contract discussions relating to the Company's Glenwood Springs meat department employees. The discussions were apparently of an exploratory nature, and do not appear to have gone much beyond an "oral proposal" by the Union that an agreement between it and Safeway contain "the ordinary conditions found within our contracts," with which the parties were familiar.

Early in June 1963, shortly after the City Markets certification, Dean telephoned Wynne with a view to resuming and completing negotiations, and Wynne proposed that Safeway and City Markets engage in "joint negotiations" with the Union. Dean demurred, starting that he had "had a hard time getting along" previously with the bargaining representative of City Markets. Wynne replied that "it was best if we do it jointly," and the upshot was that Dean agreed to Wynne's proposal; and that Safeway and City Markets thereafter met and negotiated jointly with the Union, beginning with a bargaining meeting on July 10, 1963. The Union's representatives in the negotiations included Levina McGinnis, a meat department employee at Safeway's Glenwood Springs store.

At some point prior to a bargaining meeting with the Union on August 7, 1963, the two employers agreed or reached an understanding between themselves to the

effect that if the Union engaged in a strike against the Glenwood Springs meat department of one, the other would "lock out" the meat department employees at its Glenwood Springs store.

During the negotiations, Safeway and City Markets made joint proposals to the Union; the latter addressed its proposals to both employers jointly; and both took identical positions on all subjects of negotiation, with one possible exception. That involved a position by City Markets that "their head meat cutter would not be part of the bargaining unit," or, in other words, that he be regarded as a supervisor. In connection with the election affecting its store, Safeway had agreed to include the head meatcutter in the unit. What Safeway's spokesman said about the matter during the negotiations does not clearly appear, but it is evident that he was willing to agree to the inclusion of the head meatcutter in the unit at its store. To resolve the difference, City Markets' spokesman made a proposal that, by contract, the head meatcutter at the Safeway store be included in the unit there, but that the one at the City Markets store be excluded from the unit at that establishment. The Union rejected the proposal, taking the position, as Dean testified, "that since we were in the type of negotiations where we were sitting down and discussing the thing jointly . . . we would not sign different contracts in any sense of the word."³

As of August 7, 1963, the only issues left unresolved were "money matters," and in that regard, at a meeting held on that date, Safeway and City Markets presented a written joint proposal to the Union, which said that it would submit the offer to the affected employees of both stores. It did so apparently at a meeting of the employees later that day, and they rejected the offer. The Union thereupon informed the employees that it was going to picket the City Markets store, but told the Safeway employees to continue working.

A strike, sponsored by the Union, began among the meat department employees at the City Markets store on the morning of August 8, 1963, and picketing of the establishment began on that date, and continued until September 18, 1963, when the strike was settled.

During the afternoon of the day the strike against City Markets began, Halstead and Shellman instructed Hotz to "clean up the meat department and go on home," and to tell the other department personnel to do the same. Hotz complied, and as a result, that same afternoon, the five employees he supervised, Don Snyder, Bill Burns, Michael Thomas, Richard Spinney, and Levina McGinnis, left their employment or, in other words, as Safeway concedes, were "locked out" by it.

Upon completion of the cleaning chore, Hotz and Thomas went to a back room of the store preparatory to their departure. Halstead and Shellman were there, and the former told Hotz and Thomas, in substance, that they should not picket, and that anyone who did so could be transferred to a "non-union" store and later be terminated.⁴ Halstead also told Hotz to convey this information to the rest of the employees he supervised. Hotz complied, quoting Halstead's remarks to Snyder and Burns later that afternoon; to McGinnis on the following morning; and to Safeway and City Markets meat department employees at a meeting held by the Union on August 10, 1963.

Safeway, City Markets, and the Union resumed bargaining negotiations on September 12, the two employers submitting written proposals, jointly signed by them, to the Union on that date. The upshot of the renewed talks was that the strike was settled on September 18, 1963, the negotiators reaching a complete accord as to contract terms on that date.

Shortly thereafter each employer signed a separate contract with the Union, both instruments containing, in identical language, the terms agreed upon in the negotiations. The only terms that need be mentioned here are contained in article 31 of each contract, providing that "there will be no discrimination in employment and in union membership"; and that "(b)oth parties and the employees waive all claims for all matters arising in the past."

The waiver provisions were included, as City Markets' principal negotiator, James K. Groves, testified, because there had been statements by representatives of the Union, during the course of the negotiations, that charges involving the lockout at the Safeway store could or would be filed, and it was the aim of the employers' representatives, communicated to the Union, to effect a settlement of all differences.

With the settlement of the strike, Safeway terminated the lockout as of September 20, 1963, offering each meat department employee reinstatement to his former position effective as of that date.

³ The ultimate agreement reached on the issue is of no moment. It is enough to note that the contracts separately signed by Safeway and City Markets contain identical terms.

⁴ Hotz and Thomas are in substantial accord as to Halstead's remarks. Halstead did not testify, and the relevant testimony of Hotz and Thomas is undisputed.

During the period of the lockout, Safeway operated the meat department with personnel from its Denver headquarters. These were a "meat consultant" and two "meat trainers" who are regarded by the Company as supervisors, and have the function of improving meatcutting procedures in Safeway stores.

B. The discharge of the Levina McGinnis

Levina McGinnis entered Safeway's employ in the meat department at the Glenwood Springs store about a year before the lockout. Her work, which included meat-wrapping was satisfactory to the management during that period. She received no complaints about her performance, and was given a merit increase only a few days before the lockout in addition to a prior "automatic" increase.

About a week after the picketing of the City Markets store began, the Union asked Safeway's meat department employees to participate in the picketing. McGinnis was the only Safeway employee to do so, engaging in the activity for most of the period of the strike. Shellman saw her picketing daily, and told Halstead that he had seen her doing so.

According to Hotz, about 2:30 p.m. on September 23, 1963, McGinnis' first day of work following the end of the lockout, Halstead asked him about McGinnis' work, and Hotz replied, in substance, that he "thought it was a little slow."

Halstead summoned McGinnis to the office of the store that day and, in the presence of Shellman and Hotz, charged her with deficient performance in production. She expressed the view that she "was producing," to which Halstead replied that "that is just your opinion," and that Hotz had criticized her production. Shellman then prepared a written statement to the effect that McGinnis' production rate was "very slow," and that she had been so informed and told "to speed up"; and signed it, requiring McGinnis and Hotz to do so also.

About a month later, on October 21, 1963, Shellman told McGinnis that she "wasn't smiling" at customers and was displaying an attitude of aloofness toward them; and that she had been reported in that connection by a Safeway "shopper" (employed by the Company to observe and report sales activities and other procedures in its stores), McGinnis asked Shellman whether he had the report, and he replied that he did not "know where it was at the time." Shellman prepared a written statement of the alleged deficiency, signing it with Hotz, and gave it to McGinnis.

On October 30, 1963, Halstead informed McGinnis that she was being discharged because he had had "two complaints," one of them that she was not doing her work, and the other that she "didn't greet customers." The dismissal became effective on November 2, 1963, the end of McGinnis' pay period.

In mid-November 1963, about 10 days after McGinnis filed her charge alleging that her dismissal was unlawful, Hotz, at Shellman's direction, came to McGinnis' home and told her that instructions had been received at the store (from Halstead, according to Shellman's testimony) to reemploy her. She asked Hotz whether he could "honestly" say that she had not done her work, and he replied, "No, Levina, I can't but you can rest assured that Safeway is not through with you yet." He also said that he did not know what the Company would "try next."⁵

As requested by the Company, McGinnis returned to work on November 18, 1963. Since her return, the Company has paid her 2 weeks' wages for the time she was absent.

C. Discussion of the issues; concluding findings

The ultimate issues in this proceeding are (1) whether the lockout was lawful; and (2) whether McGinnis was discharged because she engaged in picketing the City Markets store.

Taking the second issue first, it is a significant and undisputed fact that at the very inception of the lockout, Halstead, a management official of considerable supervisory responsibility, went to some pains to discourage picketing during the strike, telling Hotz and Thomas that anyone who picketed could be transferred to a nonunion store and terminated; and instructing Hotz to relay that information to the other meat department personnel. In passing, I note that at the hearing the Respondent placed some stress on the fact that Halstead said that picketing employees "could be" transferred or discharged rather than that they would be. If the import of this is that Halstead's remarks were not a threat of reprisal, the position appears to me to be a quibble. From the very terms Halstead used, particularly taking his position into account, his relevant remarks were a coercive thrust at the free exercise by the

⁵ McGinnis' description of her conversation with Hotz is undisputed. Her account of what Hotz said is evidential in view of his status as McGinnis' supervisor, and the fact that the Respondent claims that it based the discharge, in part, on a complaint by Hotz regarding McGinnis' work.

employees of rights guaranteed them by Section 7 of the Act; and were designed, I find, to intimidate them into abstention from picketing.⁶

Against the background of Halstead's threat of reprisal, the fact that McGinnis was the only locked-out employee who picketed, and the only one who was discharged, takes one much along the road to a conclusion that the threat was carried out in her case. The conclusion becomes unavoidable upon an examination of the whole record, particularly the "two complaints" Halstead put forward to McGinnis as the reason for dismissing her. Actually, it is well to note, the Respondent does not tell us in the form of sworn testimony what reasons moved Halstead to discharge McGinnis, for Halstead, who was the one who made the decision to dismiss her, did not testify (nor has the Respondent explained its failure to produce him). Obviously, even if one were to attribute substance to the two "complaints" made by the management against McGinnis, they could still have been a pretext to cloak an unlawful reason for her discharge, but on that score, the Respondent's case, in the absence of any sworn testimony by Halstead as to his motive, leaves us in the dark.

In any event, the "two complaints" have a flimsy and tenuous quality. There is even good reason to doubt that Hotz actually complained to Halstead about McGinnis' production rate. She had been a satisfactory employee up to the point of the lockout, had received a merit increase shortly before it began, and had been at work only a few hours following the end of the lockout when the alleged complaint was made; and there is no indication that Hotz said so much as a word of criticism to McGinnis before Halstead's alleged inquiry. Adding these factors to the undisputed evidence that Hotz admitted to McGinnis when he recalled her for work that he could not "honestly" say that her production was deficient, stating, also, that she could "rest assured that Safeway is not through with you yet," there is large warrant for a doubt, to say the least, that Hotz made a complaint of any substance to Halstead, although I have no question that the latter made an inquiry of Hotz about McGinnis' performance.

However, putting aside my doubt that Hotz' reply was what he says it was, and assuming that it was one of criticism of McGinnis' production, a number of factors lead me to conclude that the affair in the store office on September 23 was staged, and that the subsequent "complaint" that McGinnis was unsmiling and aloof was formulated, in a hunt for pretexts to discharge her because she had picketed.

That conclusion is supported, for one thing, by the very fact that Halstead singled McGinnis out for inquiry of Hotz, when one takes into account Halstead's prior threat of reprisal, the fact that McGinnis was the only Safeway employee who picketed, and that the inquiry was made on the first day of her return to work following the picketing.⁷

For another matter, there is an artificial quality about the scene in the store office. In view of McGinnis' performance record, it is not quite plausible that a man of such large managerial responsibilities as Halstead would summon her before a supervisory hierarchy solely to give her a dressing down for poor performance on the basis of a report that her work had slowed down over a period of a few hours. One would think it more natural for Halstead to pass the matter on for attention by Shellman (if not, indeed, to McGinnis' immediate supervisor, Hotz, alone), and the fact of Halstead's personal participation in the affair, with its weight of supervisory signatures on the "complaint," contributes support to a conclusion that the whole business in the office was staged to provide a gloss of justification for McGinnis' future dismissal.⁸ Any doubt about the matter, if any remains, is dissipated, it seems to me, by Hotz's admission to McGinnis to the effect that he did not regard her production as deficient.

⁶ Whether or not one takes Hotz' supervisory status into account, his relevant statements are imputable to Safeway because he made them upon Halstead's instructions.

⁷ Shellman claims he was present during the colloquy between Halstead and Hotz in the meat department. Initially, Shellman testified that Halstead "asked Martin Hotz how she [McGinnis] was doing," but then added that Halstead asked "how all the employees were doing in the meat department." In contrast, Hotz testified that his criticism "wasn't conveyed to Mr. Shellman first," and that "Mr. Halstead came in the meat department and asked me how her work was and I proceeded to tell him that I thought it was a little slow." I am satisfied that Halstead singled McGinnis out for inquiry, taking into account Shellman's differing versions of the content of Halstead's inquiry: Hotz' testimony; and that there is no indication that Halstead inquired about any other employee by name.

⁸ Hotz, it is interesting to note conceded in his testimony that the presence of the three supervisors on the occasion of "a first warning" to McGinnis appeared to him to be "probably a little unusual," adding "but there again, this was my first experience with the union operation."

The second "complaint" is even thinner than the first. Shellman admitted that McGinnis has "always" been "a reserved person . . . who was quiet and kept to herself," and that before the strike he would see her some 20 times a day while at work. Thus one is led to wonder what there was about McGinnis' attitude after she picketed to distinguish it from what it was when she was a satisfactory employee who rated a merit increase, and, indeed, Shellman was under visible and evident strain to state the difference, offering no more than patently thin opinions that "her actions seemed to be a little stiffer than they were before the strike" and that this was manifested "not in speaking," but that she was "a little more self-conscious, or something like that," than she had been prior to the strike.

To be sure, according to Shellman, he had received a report from the "shopper," but if one looks to this for tangible evidence that McGinnis was unsmiling and aloof, he is fated to disappointment, for the alleged report was not produced at the hearing, Shellman claiming that he had "hunted around for it" without avail. Perhaps the "shopper" retained a copy; perhaps the "shopper" could corroborate Shellman; but if that individual could, we are left in the dark about it, for there is no information that the Respondent attempted to locate a copy or to produce its "shopper." Actually, the report, if it exists, is something less than a firm prop for the "complaint" Shellman makes against her, for, claiming at first that the "shopper" reported that McGinnis was unsmiling and failed to greet customers, Shellman changed course and admitted that McGinnis was not mentioned in the document by name, and that it referred to "meat department employees." From subsequent testimony he gave, the report appears to have been even more general than that, for he agreed that it was, in the main, "devoted to the usual general criticism of a Safeway chain store," and that what it said on the subject of personnel attitudes was that "the employees in the store could be more conscientious, or something to that effect, about greeting customers."

Whichever one of Shellman's generalizations one follows, it raises the question why he assumed the alleged report applied to McGinnis, and his answer to that is as about as strained as his distinctions between McGinnis' attitudes before and after the strike. He reached his conclusions, he testified, because "she is the only one that sees customers all the time. The meatcutters are facing with their backs to the customer, and only part of the time are they facing the front," But, as he then conceded, the meatcutters also wait on customers when the product is cut to their specification.

Shellman's explanation of his interpretation of the report as a criticism of McGinnis is manifestly wanting, but the record, taken as a whole, supplies an answer, and it is that the Respondent has chosen to read it that way in order to provide itself with a sham predicate for the discharge. The very fact that the Respondent reinstated her (after she filed her charge, it may be recalled) supports an inference that there was no real substance to the "two complaints" in the first place. To cap the matter, Shellman, who, one may fairly conclude, is privy to Safeway's personnel policies affecting the store he manages, in effect admitted that Halstead had an attitude of reprisal toward McGinnis for picketing. He was asked, under cross-examination, whether he "didn't know for sure," while McGinnis was picketing, that she would be discharged after the strike, and he replied: "There is possibilities. I mean he (Halstead) was there all the time the strike was on in Glenwood Springs." Subsequently, he made a firmer reply to much the same question, admitting that he "kind of felt she (McGinnis) might" be discharged after her return to work following the strike.

The sum of the matter is that Halstead discharged McGinnis because she picketed the City Markets store on behalf of the Union, and that by the dismissal, Safeway discriminated against her in violation of Section 8(a)(3) of the Act; and interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, thereby violating Section 8(a)(1) of the Act.⁹

⁹ The Respondent's answer contains an allegation that the issue of the legality of the discharge has been "submitted by and on behalf of Levina McGinnis" for determination under the grievance and arbitration procedures of the contract, and requests that this proceeding be held in abeyance pending the result. There is no evidence that there has been such a submission "by and on behalf" of McGinnis (Shellman gave some hearsay testimony that a grievance had been filed, and did not state by whom), but quite apart from that I find no warrant for the course the Respondent urges. The Board has a policy of deference to arbitral results when certain standards are met, including the presence of an agreement by "all parties . . . to be bound." *Spielberg Manufacturing Company*, 112 NLRB 1080; *Lummus Company*, 142 NLRB 517. Obviously, this is not such a case. Moreover, a discharge such as that involved here strikes at the heart of rights guaranteed employees by the Act, e.g., *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4), and I thus think that a suitable cease-and-desist order by the Board is particularly necessary in this type of case.

As for the lockout, two subsidiary questions require consideration before resolution of the issue of its legality. One is whether the meat department employees of the two Glenwood Springs stores constituted a multiemployer unit, notwithstanding the separate unit determinations in the representation cases. Although the Union was initially reluctant to bargain with the employers jointly, the evidence establishes that it agreed to do so, going so far as to insist on identical terms even as to the one issue (the status of the head meatcutter) on which the employers were willing to agree to separate provisions. A multiemployer unit may arise by express agreement of the bargaining parties, whether or not each employer signs a separate contract embracing the terms jointly agreed upon.¹⁰ Thus I find that the effect of the agreement for joint negotiations, and of the joint bargaining that followed, was to merge the two certified units into one and to constitute the included employees a multiemployer bargaining unit.

The other prefatory matter derives from a position by the Respondent to the effect that the Board, although not bound by the waiver provisions in article 31 of the contract, should give them effect and dismiss the lockout allegations.

Without implying any view on the question whether the Board should ever give that effect to such waiver terms, I have no doubt that it should decline to do so here. Article 31 not only provides that "the parties and the employees waive all (past) claims," but that "there will be no discrimination in employment." By the discrimination against McGinnis, the Respondent violated not only the Act, but breached its contractual obligation to abstain from such conduct. That being the case, I am unable to see how it would either serve the policies of the Act or advance the interests of collective bargaining for the Board to stay its hand. I find no merit in the Respondent's position.

Turning, now, to the legality of the lockout, it is well established that where employers engage in group bargaining and there is an economic strike against one of their number, the others may temporarily lock out their employees. In the *Buffalo Linen* case,¹¹ the United States Supreme Court, striking a balance between the statutory right of employees to strike for economic ends and the interest of employers engaged in group bargaining in preserving their bargaining strength, held that such a lockout was a legitimate defensive means of protecting the integrity of the multiemployer bargaining unit against the disintegration that could result from a "whipsaw" strike.

In *John Brown, Irvin L. Gossett and J. C. West, Jr., d/b/a Brown Food Store*, 137 NLRB 73, the Board found that the rationale of *Buffalo Linen* did not apply where members of a bargaining group of employers continued to operate with replacements for locked-out employees. The Board (at p. 75) held such a lockout to be "retaliatory" and not "defensive," and hence unlawful, because it may reasonably be inferred that the employers resorted to the lockout and the hiring of replacements "not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike." Reversing the Board and denying enforcement (*N.L.R.B. v. Brown Food Store*, 319 F. 2d 7), the Court of Appeals for the Tenth Circuit saw no material distinction between that case and *Buffalo Linen*, stating, in that regard, "that the acts . . . of hiring replacements, presented as they are here against an uncluttered background, do not carry such indicia of intent as to warrant an inference of unlawful motive." The Supreme Court has granted certiorari in the *Brown* case, but had not announced its decision as of this writing.

The Respondent relies heavily upon the decision of the court of appeals in *Brown Food Store*, making the argument, in substance, that, as in that case, the operation of the meat department with temporary replacements during the lockout does not remove the lockout from the *Buffalo Linen* doctrine. The difficulty with this thesis is that one does not reach the *Brown* decision in appraising the legality of the Respondent's action, for the facts here are distinguishable from those in the *Brown* case. The nub of the matter is that the Respondent's lockout has not, to quote the apt phrase of the court of appeals, "an uncluttered background," and it is an important fact that in addition to locking out the meat department employees and continuing to operate the department with replacements, the Respondent, in effect, forbade its employees, under the threat of reprisal, to picket, or in other words, to engage in a protected activity which could aid them in bargaining with their employer. In that context, to separate the lockout as a "defensive" action from the threat of retaliation by Halstead, and the repetition of the threat by Hotz at Halstead's bidding, is a venture in illusion. The threats were both a shackle and a club, and it is but reasonable to expect

¹⁰ Eg., *Local Union 49 of the Sheet Metal Workers Association, et al. (New Mexico Sheet Metal Contractors Association, Inc.)*, 122 NLRB 1192, 1194

¹¹ *N.L.R.B. v. Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL (Buffalo Linen Supply Co.)*, 353 U.S. 87

that they would operate in tandem with the lockout to nullify or weaken not only the bargaining strength of the employees but rights guaranteed them by the Act. That being the case, to uphold the legality of the Respondent's lockout is not to strike the balance of conflicting interests visualized by the *Buffalo Linen* case, but to create an imbalance in the Respondent's favor.

In sum, the record warrants an inference that the lockout was part of a program of inhibiting the employees in strike activities designed to support their bargaining aims; and I thus find that by locking out its five nonsupervisory meat department employees, the Company discriminated against them in violation of Section 8(a)(3) of the Act, and abridged their Section 7 rights, thus violating Section 8(a)(1) of the statute.¹²

Finally, I find that by Halstead's statement to Thomas, a nonsupervisory employee, that employees who picketed would be transferred or terminated, and as a result of each repetition of the statement by Hotz to Safeway employees, as found above, the Company interfered with, restrained, and coerced employees in the exercise of Section 7 rights, and thereby violated Section 8(a)(1) of the Act.¹³

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON 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

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act, I shall recommend below that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

The discrimination and the threats thereof demonstrate hostility by the Respondent to the full and free exercise by its Glenwood Springs employees of the rights guaranteed them by Section 7 of the Act. Thus in order to make effective the interdependent guarantees of Section 7, I shall recommend an order below which will have the effect of requiring the Respondent to refrain in the future from abridging any of the rights guaranteed its Glenwood Springs employees by said Section 7.¹⁴

The Respondent, citing *The Great Atlantic & Pacific Tea Company*, 145 NLRB 361, and relying on the waiver provisions of the contract and the fact that the agreement provided wage increases for the meat department employees, urges that in the event of a finding that the lockout was unlawful, the Board should, as a matter of equity, dispense with the customary backpay order for the locked-out employees. The

¹² In its brief (as in substance at the hearing) the Respondent puts forward a "hypothesis" that McGinnis amended her charge to include the lockout allegations because she was "induced to do so by (a) Board agent." There is no evidence to support the claimed "hypothesis," and, in fact, the Respondent concedes as much in its brief. But it suggests, in substance, that it might have been able to prove its point but for a ruling at the hearing revoking a *subpoena duces tecum* issued to the Respondent seeking the production of "any correspondence" between McGinnis and any Board "agents" in November and December 1963, "or any memoranda of conversations" between them, relative to the filing of the amended charge. I touch here upon the ruling because the Respondent in effect reargues the matter in its brief, asserting that the ruling was in "error." Passing the fact that there is not a bit of evidence that such "correspondence" or "memoranda" exist, it may be noted once again, as at the hearing, that neither the Board nor the General Counsel has given "written consent" to the production of "correspondence" or "memoranda," as required by Section 102.118 of the Board's Rules and Regulations, and the Respondent admittedly has not requested it. It seeks to excuse this omission with a claim that it had no "available time" during the hearing to do so, but it is enough to note in that regard that it sought neither a continuance nor any other opportunity to request the required consent.

¹³ The complaint contains no allegation that the threats violated the Act, but that does not preclude the finding made since the undisputed evidence upon which it rests was "fully litigated" at the hearing and, in fact, is part of the foundation of the conclusion that the lockout and McGinnis' discharge were unlawful. See *N.L.R.B. v Puerto Rico Rayon Mills, Inc*, 293 F. 2d 941 (C.A. 1).

¹⁴ *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532 (C.A. 4); *May Department Stores d/b/a Famous-Barr Company v. N.L.R.B.*, 326 US 376; *Bethlehem Steel Company v. N.L.R.B.*, 120 F. 2d 641 (C.A.D.C.).

cited case is not wholly analogous, for there, as the Board pointed out, "the wage rates of employees . . . were increased as consideration for the withdrawal" of charges of discrimination. In contrast, there is no showing here—or a clear demonstration at least—that the wage increases were designed to compensate the locked-out employees for the time they lost. However, each term of the contract mutually provides consideration for every other, and this is true of the wage increase and waiver provisions. Moreover, one may fairly conclude that the contracting parties intended the waiver terms to settle all "past" matters in dispute between them, including wage losses sustained by the employees as a result of the lockout. Thus, although it would be quite inappropriate, for reasons previously stated, for the Board to forgo findings that the lockout was unlawful, and an appropriate cease-and-desist order, I find it equitable to dispense with provisions for backpay reimbursement for the period of the lockout.

Although Levina McGinnis has been paid the equivalent of 2 weeks' wages for the period she was absent from work as a result of her discharge, I am unable, on the record as made, to exclude the possibility that she would have had overtime or other work requiring premium pay under the contract had she not been discharged. These are matters that may, and should, be determined in the compliance stage of these proceedings. At that time, the Respondent, needless to say, will receive appropriate credit for any wage payment it has already made to McGinnis. For the reasons stated, I shall recommend the customary backpay remedy for her.

Having found that the Company unlawfully discriminated against Levina McGinnis by discharging her as of November 2, 1963, and that it reinstated her to her former employment on November 18, 1963, I shall recommend that the Company make her whole for any loss of pay she may have suffered by reason of the discrimination against her by payment to her of a sum of money equal to the amount of wages she would have earned, but for the said discrimination, together with interest thereon, as provided below; and that the said loss of pay, plus interest at the rate of 6 percent per annum, be computed in accordance with the formula and method prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, to which the parties hereto are expressly referred.

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. The Company is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.
2. Each of the employees against whom the Company discriminated, as found above, has been, at all material times, an employee of the said Company within the meaning of said Section 2(3) of the Act.
3. The Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.
4. By discriminating against employees, as found above, the Company has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
5. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, as found above, the Company has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce 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 this proceeding, I recommend that the Respondent, Safeway Stores, Incorporated, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees at its store in Glenwood Springs, Colorado, in Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 643, AFL-CIO, or in any other labor organization, by locking out, discharging, or otherwise denying employment to, any such employee, or in any other manner discriminating against any such employee in regard to his hire, tenure of employment, or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act.

(b) In any manner threatening or otherwise informing any of its employees that any of them may, or will, be transferred or discharged if any engage in picketing for, or on behalf of, any labor organization, or in any other activity which is protected by Section 7 of the said Act.

(c) In any other manner interfering with, restraining, or coercing employees employed at its Glenwood Springs, Colorado, store in the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights 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.

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

(a) Make Levina McGinnis whole, together with interest, in the manner, according to the method, and to the extent set forth in section V, above, entitled "The Remedy."

(b) Preserve until compliance with any order for backpay made by the National Labor Relations Board in this proceeding is effectuated, and, upon request, make available to the said Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant to a determination of the amount of backpay due, as provided under the terms of such order.

(c) Post at its store and place of business in Glenwood Springs, Colorado, copies of the attached notice marked "Appendix A."¹⁵ Copies of said notice, to be furnished by the Regional Director for Region 27 of the National Labor Relations Board, shall, after being signed by a duly authorized representative of the Company, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the said Company to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply therewith.¹⁶

It is further recommended that, unless on or before 20 days from the date of its receipt of a copy of this Decision the Respondent notify the said Regional Director that it will comply with the foregoing Recommended Order, the National Labor Relations Board issue an order requiring the Respondent to take the actions aforesaid.

¹⁵ In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the additional event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order."

¹⁶ In the event that this Recommended Order is adopted by the Board, paragraph 2(d) thereof shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply therewith."

APPENDIX A

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT discourage membership of any our employees at our store in Glenwood Springs, Colorado, in Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 634, AFL-CIO, or in any other labor organization by locking out, discharging, or otherwise denying employment to, any such employee, or in any other manner discriminating against any such employee in regard to his hire, tenure of employment, or any term or condition of employment, except as authorized in Section 8(a)(3) of the said Act.

WE WILL NOT threaten or otherwise inform any of our employees that any of them may be transferred or discharged if any engage in picketing for, or on behalf of, any labor organization, or in any other activity which is protected by the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees employed at our Glenwood Springs, Colorado, store in the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted

activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights 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.

WE WILL make Levina McGinnis whole for any loss of pay she may have suffered by reason of the fact that we discriminated against her.

SAFeway STORES, INCORPORATED,
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.

Information regarding the provisions of this notice and compliance with its terms may be secured from the Regional Office of the National Labor Relations Board, 609 Railway Exchange Building, 17th and Champa Streets, Denver, Colorado, Telephone No. Keystone 4-4151, Extension 513.

H. B. Roberts, Business Manager of Local 925, International Union of Operating Engineers and Local 925, International Union of Operating Engineers [Wellman-Lord Engineering, Inc.] and Wallace J. Martin. *Case No. 12-CB-605. August 31, 1964*

DECISION AND ORDER

Upon charges duly filed by Wallace J. Martin, the General Counsel of the National Labor Relations Board, by the Director for Region 12 on July 13, 1962, issued a complaint against Respondents, H. B. Roberts, business manager of Local 925, International Union of Operating Engineers and Local 925, International Union of Operating Engineers. Copies of the charges, the complaint, and notice of hearing before a Trial Examiner were duly served upon Respondents and the Charging Party. In substance the complaint alleged that Respondents violated Section 8(b)(1)(A) of the Act by fining the Charging Party because he had filed unfair labor practice charges with the Board.

Respondents' answer admits the jurisdictional allegations of the complaint and the factual allegations except that Respondents deny that the Charging Party was a member of Respondent Union at the time the complaint issued and that a fine was imposed against the Charging Party because he had filed charges with the Board. Respondents assert, rather, that Martin was fined pursuant to Respondent Union's bylaws because he failed to exhaust his internal union remedies prior to filing his charge with the Board. Respondents denied the commission of any unfair labor practices.

On August 17, 1962, all parties to this proceeding entered into a stipulation of facts, and on the same date moved jointly to transfer this proceeding directly to the Board, for findings of fact, conclusions