

United Food and Commercial Workers; Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 576 and R & F Grocers, Inc. Case 17-CP-223

26 August 1983

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 4 February 1983 Administrative Law Judge William J. Pannier III issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief to Respondent's exceptions.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge's conclusion that it is unnecessary to determine whether R & F Grocers, Inc., is the *alter ego* of Muehlbach & Sons, Inc. In view of our agreement on this point, we find it unnecessary to pass on the Administrative Law Judge's discussion of the law concerning *alter egos*.

Chairman Dotson adopts the Administrative Law Judge's conclusion that Respondent violated Sec. 8(b)(7)(C) solely on the ground that there is no basis for finding that the R & F Grocers, Inc. meat department employees are an accretion to the then-existing bargaining unit of Muehlbach & Sons, Inc. meat department employees under the principles of *Melbet Jewelry Co., Inc.*, 180 NLRB 107 (1969).

² Member Jenkins finds, concerning Respondent's contention that R & F Grocers, Inc., is a single or joint employer and/or the *alter ego* of, or the successor employer of, Muehlbach & Sons, Inc., that no *alter ego* or single-employer relationship exists between the two entities. He notes that the two owners of R & F Grocers, Inc., have only a minor ownership interest in Muehlbach & Sons, Inc.; there is no evidence that Robert J. Muehlbach has supervised any Muehlbach & Sons, Inc. employees since R & F Grocers, Inc. was opened; while both entities are involved in the same industry, the R & F Grocers, Inc. store is significantly smaller than the Nichols Road Muehlbach & Sons, Inc. store and caters to a different group of customers; and the two entities operated concurrently for approximately a 7-month period. See, generally, *J. M. Tanaka Construction*, 249 NLRB 238 (1980), enf'd. 675 F.2d 1029 (9th Cir. 1982). He does not rely on the Administrative Law Judge's discussion of the law concerning *alter egos*.

Order of the Administrative Law Judge and hereby orders that the Respondent, United Food and Commercial Workers; Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 576, Kansas City, Missouri, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Kansas City, Kansas, on October 26, 1982, pursuant to an "Order Reopening Record and Remanding Proceeding to Regional Director for Further Hearing" issued by the Board on June 30, 1982. On September 30, 1980, the Board issued a Decision and Order¹ concluding that United Food and Commercial Workers; Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 576, herein called Respondent, had engaged in unfair labor practices in violation of Section 8(b)(7)(C) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act. In so finding, the Board refused to permit Respondent to introduce, as a defense, certain evidence that the General Counsel previously had considered in refusing to issue an unfair labor practice complaint against R & F Grocers, Inc.,² herein called the Employer. Thereafter, on April 2, 1982, the United States Court of Appeals for the District of Columbia issued an opinion³ holding that the Act required the Board to permit Respondent to introduce that evidence as a defense in this proceeding. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs filed on behalf of the parties, and on my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. BACKGROUND

Since 1874, George Muehlbach & Sons, herein called Muehlbach & Sons, has engaged in the business of operating retail foods stores, principally in the States of Missouri and Kansas. For at least the last 20 years, Muehlbach & Sons has maintained a collective-bargaining relationship with Respondent who serves as the bargaining representative of, as described in the 1978-80 collective-bargaining agreement, "All meat department employees coming under this agreement and working in [Muehlbach & Sons'] retail stores in the Greater Kansas City Area." As might be anticipated, during its period of operations, Muehlbach & Sons has opened and closed a number of different facilities at various locations. Apparently, since inception of the bargaining relationship, Muehlbach & Sons has extended recognition to Respond-

¹ 252 NLRB 1110.

² The name was amended at the hearing.

³ 675 F.2d 346.

ent as the representative of meat department employees in each of the stores that it has opened in the greater Kansas City area.

In late May or early June 1979,⁴ the Employer, having been incorporated in June 1978, commenced operating a retail foods store on Jefferson Street in the Country Club Plaza, a location encompassed within the above-described geographic jurisdiction of Respondent. All the Employer's stock is held, in equal shares, by two brothers: George F., herein called Frank, and Robert J. Muehlbach. Each of them holds five Class A voting shares of stock in Muehlbach & Sons.⁵ At the time that the Employer had commenced operations, Muehlbach & Sons had been operating a retail food store on Nichols Road in the Country Club Plaza, approximately two blocks from the Jefferson Street facility of the Employer, for a number of years. However, the Nichols Road facility had been scheduled to be closed at the time that the Employer had open inasmuch as the lessor had declined to renew the lease for it. In fact, the Nichols Road facility was closed on December 23 or 24, with the result that, for approximately 7 months, the Employer and Muehlbach & Sons had concurrently operated stores in the Country Club Plaza.

II. THE ISSUES

Respondent's collective-bargaining agreement with Muehlbach & Sons had been applied to meat department employees working at the Nichols Road store, but the Employer has declined to recognize Respondent as the representative of meat department employees working at the Jefferson Street store and, further, has declined to apply that collective-bargaining agreement so that it governed their terms and conditions of employment. It was this declination that had led Respondent to engage in the picketing described in the Decision and Order in this matter and, concomitantly, to the filing of the unfair labor practices charge and issuance of the complaint alleging that Respondent had violated Section 8(b)(7)(C) of the Act by its picketing. In its answer, Respondent advanced several contentions that, it asserted, serve to exculpate it from whatever violation of the Act it might otherwise have committed when it had picketed the Employer without having filed a representation petition. Thus, the answer recites that the Employer "is a single or joint employer and/or the alter-ego of and/or the successor employer of Muehlbach & Sons, Inc."; that inasmuch as the latter entity was bound to the collective-bargaining agreement then in effect with Respondent, the Employer also was obliged to honor that agreement; that the Employer "failed and refused to employ present employees or presently-laid off employees or to request referrals required by the current collective-bargaining contract"; and, that the Employer "failed to bargain in good

faith and transfer present employees and/or presently laid off employees or request referral employees demanded by the terms and conditions of the current collective bargaining contract."

Analysis of Respondent's contentions, in light of the facts presented at the reopened hearing, lead to the ultimate conclusion that a preponderance of the evidence fails to establish that Respondent had been entitled to the status of collective-bargaining representative of the Jefferson Street store meat department employees and, accordingly, to the further conclusion that, by having chosen to picket to secure that status, Respondent had been seeking initial, not continued, recognition as the representative of those employees. More specifically, even had Muehlbach & Sons itself been the entity that had opened and begun operating the Jefferson Street store, Respondent would not have been entitled to recognition as the bargaining representative of meat department employees hired to work there in the circumstances presented in this case. Thus, inasmuch as Respondent conducted its picketing without having filed a representation petition, in the manner described in the Decision and Order in this matter, its conduct violated Section 8(b)(7)(C) of the Act.

III. ANALYSIS

It is undisputed that the meat department at the Jefferson Street store had not been staffed by employees from any of Muehlbach & Sons' other stores, including the Nichols Road store, and, further, that Respondent had not attempted to obtain authorization cards from employees working in the Jefferson Street meat department. Nor did Respondent have any other basis, such as union membership held by Jefferson Street meat department employees, for asserting that it represented a majority of those employees. Nevertheless, based on the above-described theories, Respondent argues that the relationship between the Employer and Muehlbach & Sons is such that the Jefferson Street employees automatically became a part of the then-existing contractual bargaining unit, without the need for Respondent to secure actual support from a majority of them. In short, Respondent contends that the meat department employees at the Jefferson Street store had constituted an accretion to its then-existing bargaining unit in light of the relationship between the Employer and Muehlbach & Sons.

While the Board and the courts have not always been precise in their use of the joint employer, single employer, successor and *alter ego* concepts, the fact remains that each is a distinct concept, distinguishable from each of the others. Two of them, successor and *alter ego*, properly are applied to situations where one employer follows, at least seemingly, another in time. That is, at least nominally, one employer exits stage right as the other enters stage left. Thus, the successorship doctrine is applied where there has been a bona fide change in ownership of an enterprise and it must be determined to what degree the purchasing *independent* employer is continuing the business of the selling *independent* employer. "The concept of 'successorship' . . . contemplates the substitution of one employer for another, where the predecessor em-

⁴ Unless stated otherwise, all dates occurred in 1979.

⁵ There are 837 additional Class A voting shares that, during 1978, were held by their father, G. Leslie Muehlbach, but which were placed in a revocable trust by him on March 22, 1978. Thereafter, G. Leslie Muehlbach began phasing out his active participation in Muehlbach & Sons' management so that, by the time of the events in this proceeding, he had largely withdrawn from active management, leaving that to his two sons.

ployer either terminates its existence or otherwise ceases to have any relationship to the ongoing operations of the successor employer." *Hendricks Miller Typographic Co.*, 240 NLRB 1082, 1083, fn. 4 (1979). The *alter ego* concept takes the matter one step further, applying to situations where, although it appears that a new employer has succeeded to the operation in question, in fact the latter is "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942); see also *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 259, fn. 5 (1974).⁶

By contrast, the concept of single and joint employer apply where there is continued concurrent operation by, at least seemingly, two separate entities. That is, both employers remain on stage simultaneously. As was true of the successor in the area of temporally successive concepts, the joint employer concept applies to truly independent businesses which "have historically chosen to handle jointly . . . important aspects of their employer-employee relationship . . ." *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966), cert. denied 385 U.S. 1008 (1967); see also discussion *Sun-Maid Growers of California*, 239 NLRB 346, 350-351 (1978), enfd. 618 F.2d 56 (9th Cir. 1980), and *Tanforan Park Food Purveyors Council v. NLRB*, 656 F.2d 1358, 1361 (9th Cir. 1981). While the concept applies to situations where the entire business of each employer is handled jointly, and thus in a sense merged, it also applies to situations where but a part of each employer's business is subjected to joint handling, leaving the remaining business of each independent and outside the scope of the joint relationship. See, e.g., *Sun-Maid Growers, supra*. By contrast, like the *alter ego* concept in temporarily successive situations, the single employer concept involves nominally separate enterprises that "are not what they appear to be [but] in truth they are but divisions or departments of a 'single enterprise.'" *NLRB v. Deena Artware*, 361 U.S. 398, 402 (1960); see also *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800, 802, fn. 3 (1976); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1042-1043 (8th Cir. 1976); *Telegraph Workers v. NLRB*, 571 F.2d 665, 677 (D.C. Cir. 1978), cert. denied 439 U.S. 827.⁷

⁶ Lest there be suspicion that the distinction between these two concepts is but a semantic one, it is worth noting that while a successor employer generally does not become bound to collective-bargaining agreements to which its predecessor is a party, where an employer is found to be an *alter ego*, it is bound to those agreements. See, e.g., *NLRB v. Trico Products*, 636 F.2d 266, 269-270 (10th Cir. 1980), and cases cited therein, and *Jersey Juniors, Inc.*, 230 NLRB 329, 333 (1977).

⁷ Like the temporarily successive concepts, the difference between joint and single employers is not a semantic one, certainly with respect to remedies imposed for violations of the Act. Where a single employer relationship exists, all nominally independent employers are obligated fully, by virtue of the relationship among them, to remedy the unfair labor practices committed by one of them. See, e.g., *Majestic Molded Products v. NLRB*, 330 F.2d 603, 607-608 (2d Cir. 1964); *NLRB v. Master Slack*, 618 F.2d 6, 8 (6th Cir. 1980). By contrast, liability of all joint employers for the commission of unfair labor practices by one of them is confined to the scope of the joint employer relationship. That is, all joint employers are not liable for unfair labor practices committed by one of them in conducting independent operations that are not encompassed by the joint employer relationship. Thus, applying the analogy used above, in the case of the single employer concept, the entire stage is deemed occupied by all of the component employers whereas, in the case of the joint employer, there may be areas of the stage that each of the joint employers occupies independently of the others.

Whether the instant case is viewed as presenting a successive situation, because the Employer commenced operations in Country Club Plaza at a time when Muehlbach & Sons had knowledge that it would be ceasing operations in the Plaza—thereby giving rise to the argument that the Employer opened in anticipation of closure of the Nichols Road store—or whether it is characterized as a concurrent situation, because both the Employer and Muehlbach & Sons continued to operate retail foods stores, it cannot be said that the successor or the joint employer concepts apply to the facts of this case.⁸ Indeed, application of either theory would not be consistent with Respondent's basic argument, to the effect that the Employer is not an enterprise that is truly independent of Muehlbach & Sons, but rather is no more than a disguised continuance of the Nichols Road store or, at least, a division or department of the single enterprise that is Muehlbach & Sons. Moreover, whatever else may be said about comparative operations of the Nichols Road and Jefferson Street stores, as noted above, no meat department employees who have worked at the Jefferson Street store ever have been employed at the Nichols Road store nor, for that matter, by Muehlbach & Sons at any of its other facilities. Absent a showing that a majority of the Employer's meat department employees, at some point in time, had been employed by Muehlbach & Sons in the bargaining unit represented by Respondent, there is no basis for concluding that the Employer is a successor to Muehlbach & Sons. See *Southwestern Broadcasters*, 255 NLRB 330 (1981), and cases cited therein; *NLRB v. Jose Costa Trucking*, 631 F.2d 604, 607 (9th Cir. 1980); *Saks & Co. v. NLRB*, 634 F.2d 681, 685-686 (2d Cir. 1980). That is, the record is devoid of evidence showing a "substantial continuity of identity in the work force hired by [the Employer] with that of [Muehlbach & Sons] . . ." *Howard Johnson Co., supra*, 417 U.S. at 264.

Similarly, while it is not theoretically inconceivable that the joint employer concept could apply to a case such as the one presented here, as set forth above, that concept is applied properly to situations where concededly independent and separate employers have joined together to conduct at least some operations jointly, but without, in the process, surrendering their separate identities. Here, of course, Respondent argues that the Employer is not truly a separate entity, but rather is no more than a sham created to disguise what, in reality, is operation of the Jefferson Street store by Muehlbach & Sons. Consequently, Respondent argues that there is no true independence between Muehlbach & Sons and the Employer. Indeed, if, in fact, Muehlbach & Sons and the Employer are separate and distinct entities who are jointly operating the Jefferson Street store, then Respondent would have no basis for asserting that its collective-bargaining agreement should apply at that location inasmuch as Respondent has no collective-bargaining relationship with that joint entity—merely with one of them.

⁸ As discussed *infra*, a preponderance of the evidence does not support the conclusion that there had been discrimination in the staffing of the Jefferson Street store, in general, or of the meat department there in particular.

This, then, reduces analysis to whether or not the Jefferson Street store is but a division or department of the single enterprise operated by Muehlbach & Sons, meaning that the latter and the Employer constitute a single employer or, alternatively, whether or not the Employer is but a disguised continuance of the operation of Muehlbach & Sons and, accordingly, is its *alter ego*. A number of factors are present in this case tending to show that Muehlbach & Sons and the Employer are a unified entity. For example, there is overlapping ownership through Frank and Robert J. Muehlbach, management of the Employer is conducted in essentially the same manner as Muehlbach & Sons' stores are managed, the Employer is the same general type of operations as that conducted historically by Muehlbach & Sons, both have used the same accounting and law firms, both use many of the same suppliers and, given the use of the name "Muehlbach" by the Employer and the fact that photographs of its owners' ancestors are posted on its walls, no clear distinction between them is made to the public. Conversely, there are a number of factors that tend to indicate that Muehlbach & Sons and the Employer are separate entities. Thus, the Employer is located in a facility never operated by Muehlbach & Sons, no Muehlbach & Sons employees have ever worked in the Employer's meat department, day-to-day management of the Employer's Jefferson Street stores is conducted by an individual, Robert J. Muehlbach, who does not manage any of Muehlbach & Sons' stores, the Employer has separate tax numbers and licenses, and the Employer has a separate membership in Associated Wholesale Grocers, the primary supplier for retail markets in the area. Yet, in the final analysis, it is not necessary to resolve the issue of whether the Employer and Muehlbach & Sons are a unified employer or are separate entities. For, save for the two exceptions discussed *infra*, even if the Jefferson Street store had been opened and directly operated by Muehlbach & Sons itself, there has been no showing that Respondent would have been entitled to become the bargaining representative of meat department employees working there.

As set forth above, Respondent's contention that it is entitled to continued recognition as bargaining representative of meat department employees at the Jefferson Street store is bottomed exclusively on its assertion that those employees constituted an accretion to the then-existing bargaining unit. Accretion is the "process through which the Board has added new employees to an existing group without holding an election." *Westinghouse Electric Corp. v. NLRB*, 440 F.2d 7, 11, fn. 3 (2d Cir. 1971), cert. denied 404 U.S. 853. Accord: *NLRB v. Food Employers Council*, 399 F.2d 501, 503 (9th Cir. 1968). Yet, in applying the accretion doctrine, the Board has cautioned that it "will not, however, under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them." *Melbet Jewelry*, 180 NLRB 107, 110 (1969). Indeed, even where a collective-bargaining agreement contains an after-acquired-stores clause, the Board

has stated expressly that such a clause "does not relieve a union of its obligation to provide the employer with proof of its majority status among the employees in the group to be added to the existing unit." *Joseph Magnin Co.*, 257 NLRB 656 (1981).

In the instant case, while the Jefferson Street and Nichols Road stores both were located in the Country Club Plaza, there were a block and a half to two blocks distance from each other in that complex. See *Gordon Mills*, 145 NLRB 771 (1963) (where approximately 500 feet between two facilities was considered to be a distance sufficient to characterize each facility as a separate plant and the employees working in each as separate bargaining units). The manager of the Jefferson Street store, Robert J. Muehlbach, independently controls all hiring, firing, disciplining, and other significant matters affecting employees working there. There is no evidence showing that Robert J. Muehlbach has supervised the day-to-day operations of any employee of Muehlbach & Sons since the Employer has opened. At best, only one or two of the Jefferson Street store employees had ever worked for Muehlbach & Sons and, more to the point, there is no evidence that any Jefferson Street store meat department employees ever had worked for Muehlbach & Sons. There is no evidence of temporary interchange of employees between the Jefferson Street store and stores operated by Muehlbach & Sons. In sum, the Jefferson Street store has an identity separate and distinct from that of stores operated directly by Muehlbach & Sons. Consequently, employees working in the Jefferson Street store can constitute a bargaining unit separate and distinct from employees working in stores operated directly by Muehlbach & Sons. See, generally, *Haag Drug Co.*, 169 NLRB 877 (1968).

Therefore, even had Muehlbach & Sons, itself, directly opened the Jefferson Street store, in the absence of a showing that it had secured majority support among meat department employees working there, Respondent would not have been entitled to become their bargaining representative under an accretion theory. It follows that even were it to be concluded that the Employer had been the *alter ego* of Muehlbach & Sons or even if the two of them constitute a single employer, there still would be no basis for permitting the Jefferson Street meat department employees to be accreted to the then-existing bargaining unit. For there remains no evidence of the required support of a majority of those employees at the time that Respondent undertook and conducted its picketing. In these circumstances, the record shows no more than that Respondent had been seeking initial, not continued, recognition as the representative of meat department employees at the Jefferson Street store, regardless of whether the Employer is a truly independent entity or, alternatively, whether Muehlbach & Sons is deemed, through the *alter ego* or single employer concepts, to be the true employer of those employees.

Two exceptions exist to the foregoing analysis, either of which, if applicable, would lead to the conclusion that the meat department employees at the Employer's Jefferson Street store were not beyond the scope of the bargaining unit represented by Respondent as it existed at

the time that that store opened for business. The first of these exceptions involves the doctrine of relocation. If it could be concluded that operations at the Jefferson Street store had been no more than a transfer there of operations that had been conducted at the Nichols Road store, then the situation presented would not be one of Respondent attempting to add new employees to an existing represented group, but rather would be one involving an identical bargaining unit moved or relocated to a different situs.⁹ As a general proposition, where there has been a relocation, even when motivated by purely economic considerations and resulting in displacement of all employees from the former location, employees at the new location remain a part of the existing bargaining unit and any collective-bargaining agreement in existence applies at the relocated facility. See, generally, *Los Angeles Marine Hardware*, 235 NLRB 720 (1978), *affd.* 602 F.2d 1302 (9th Cir. 1979), and *Republic Engraving*, 236 NLRB 1150 (1978).

However, a preponderance of the evidence will not support the conclusion that the Jefferson Street store has been no more than a relocated continuance of operations conducted at the Nichols Road store. Both stores had operated concurrently for approximately a 7-month period—from late May or early June, when the Jefferson Street store had opened, until immediately prior to Christmas when the Nichols Road store had closed. Given this period of concurrent operation, during which entirely separate complements of employees had been employed at each store, it hardly could be concluded that there had been that sequence of closure of one facility, with termination of its employee complement, followed by opening of another facility and commencement of work there by employees that is the normal hallmark of the relocation doctrine. Further, the operations conducted at the two facilities were not so identical that the Jefferson Street store could be characterized simply as having been a relocated continuance of operations conducted at the Nichols Road store. While both stores were in the same industry and sold many of the same products obtained from the same principal supplier, the Jefferson Street store, having approximately 4,500 square feet of selling space,¹⁰ is significantly smaller than was the Nichols Road store that had been approximately 12,600 square feet in size. Moreover, whereas customers catered to by the Nichols Road store had been ones who purchased relatively high volumes of merchandise, the Jefferson Street store caters to customers more inclined to purchase in smaller quantities, such as retirees and single persons living in apartments. In these circumstances, there is not a sufficient basis to conclude that operations at the Jefferson Street store had been no more than a continuation of operations that had been conducted at the Nichols Road store.

The second exception to the foregoing analysis arises where there is evidence that there has been discrimination in the selection of personnel hired to staff an oper-

ation. That is, if it is shown that one employer deliberately refused to hire or retain employees in order to preclude a bargaining obligation from arising, then the absence of a majority of employees from the preceding or other operation will not serve to bar issuance of a bargaining order under the successor, *alter ego*, or single employer concepts. See, e.g., *NLRB v. Burns Security Services*, 406 U.S. 272, 280-281 (1972), and *Joseph Magnin Co.*, *supra*. However, that is not the situation presented in the instant case.

It is not disputed that, when Buford Reid had been offered employment at the Jefferson Street store, Frank and Robert J. Muehlbach had told him that the Employer "couldn't go union because [it] was going to be a small operation [and] couldn't pay union wages." While such a statement *could* be construed as displaying an antiunion bias, in order for discrimination to be found there must be some act that could be said to have been motivated by that intent. Here, no such act exists. In his conversations with the Employer, Reid was not told that he would be denied employment if he supported the Union or attempted to secure representation by it. To the contrary, the Employer had continued to offer employment to Reid. He was the one who decided that he did not want to work for the Employer. There is no evidence that the Employer had told any other employee that he or she would not be hired if they desired or sought representation by Respondent. Nor is there evidence that union considerations influenced the Employer's selection of employees that it did hire.

True, the Employer did not offer employment to any meat department employees employed by Muehlbach & Sons, save for Reid. In other circumstances, such a failure might be construed as some evidence of discrimination in the selection of employees to be hired. However, the simple fact is that the Jefferson Street store opened at a time when the Nichols Road store was continuing in operation and, accordingly, there was continued employment at the Nichols Road store for employees who had been working there. Thus, this is not a situation where there was an experienced pool of unemployed employees available to which the Employer could resort in staffing its stores. More significantly, there is no evidence that, in staffing its own newly opened operations, Muehlbach & Sons had followed a practice of transferring employees from its existing facilities to those newly opened facilities. Rather, so far as the record discloses, Muehlbach & Sons had followed a practice of hiring a new complement of employees for each store that it had opened. Consequently, even were it concluded that Muehlbach & Sons had been true employer of Jefferson Street store employees, as Respondent argues, it could not be concluded that it had deviated from past practice in staffing that store and, accordingly, that evidence of discriminatory action could be inferred from failure to select employees then working at Muehlbach & Sons Stores to staff the Jefferson Street store. Therefore, a preponderance of the evidence does not support the conclusion that there had been discrimination in the selection of employees hired to staff the Jefferson Street store.

⁹ Then, of course, the further issue of the relationship between the Employer and Muehlbach & Sons, either under the *alter ego* concept or under the single employer one, would have to be addressed.

¹⁰ While there is a basement in the Jefferson Street store, there is no evidence that it is used as a selling area.

Respondent further argues, as set forth above, that the Employer and Muehlbach & Sons had refused to bargain about selection of employees to staff the Jefferson Street store and, further, had failed to honor the then-existing collective-bargaining agreement by failing to request that employees be dispatched to the Jefferson Street store from Respondent's hiring hall. However, as set forth above, even had Muehlbach & Sons been the entity that had opened the Jefferson Street store, it was not obliged to apply the collective-bargaining agreement to that location until such time, at least, as Respondent had secured support of a majority of meat department employees working there. Thus, even had Muehlbach & Sons been the entity operating the Jefferson Street store, it would not have been obliged to bargain with Respondent concerning the selection of employees to work there nor, concomitantly, to apply the terms of its then-existing collective-bargaining agreement, including the hiring hall provision, to that location.

Muehlbach & Sons would have been obliged to bargain concerning the effects of closure of the Nichols Road store on employees working in the meat department there. However, though two officials of Respondent testified concerning their activities during the time that the Jefferson Street store opened and the Nichols Road store had been closed, neither of them described having directed any request to Muehlbach & Sons that it bargain concerning the effects of closure of the Nichols Road store on employees there represented by Respondent. Indeed, Business Representative James Bernard Carter testified that during his conversations with various members of the Muehlbach family he had requested only that the Employer treat meat department employees at the Jefferson Street store as an accretion to the then-existing bargaining unit and that the terms of the then-existing collective-bargaining agreement be applied to the Jefferson Street location. At no point did Carter even claim that he had requested that employees be trans-

ferred from the Nichols Road store to the Jefferson Street store in light of the fact that the former would be closing. Therefore, there is no basis for concluding that Muehlbach & Sons disregarded any bargaining obligation that it owed Respondent in connection with the closure of the Nichols Road store and the effect of that closure on employees working there who had been represented by Respondent.

In sum, whether or not the Employer is an *alter ego* of Muehlbach & Sons or, alternatively, whether or not the Employer and Muehlbach & Sons constitute a single employer, the fact remains that the accretion theory could not have been applied to the Jefferson Street store and, accordingly, it cannot be concluded that Respondent was entitled to recognition as the representative of meat department employees working there. Accordingly, by its picketing to become the representative of those employees, Respondent had been seeking initial, not continued, recognition. Since that picketing was conducted for more than 30 days without a petition being filed, Respondent violated Section 8(b)(7)(C) of the Act.

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

ORDER¹¹

It is hereby ordered that the Conclusions of Law in the Decision and Order of the Board issued on September 30, 1980, be reaffirmed and that Respondent be directed to observe the terms of the Order embodied in that Decision.

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.