Eberhard Foods, Inc. *and* **Meat Cutters Local 539, United Food and Commercial Workers International Union, AFL-CIO & CLC.** Cases 7-CA-19929 and 7-CA-19930

20 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 24 February 1983 Administrative Law Judge James T. Youngblood issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed a brief in response to the exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Eberhard Foods, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The exceptions to the dismissal of the 8(a)(5) allegations involving the former Hamady Brothers stores purchased by the Respondent challenge the judge's unit finding with which we agree. No exceptions were filed to the judge's findings that the Respondent is a successor employer to Buy-Low Thrifty Market and Hamady Brothers Food Markets, and his finding that the Respondent violated Sec. 8(a)(5) by refusing to bargain with the Union with respect to a unit composed of meat department employees in the former Buy-Low stores in Marshall and Sturgis, Michigan.

DECISION

STATEMENT OF THE CASE

JAMES T. YOUNGBLOOD, Administrative Law Judge. The consolidated complaint, as amended on January 22, 1982, alleges that Eberhard Foods, Inc. (herein Respondent or Eberhard) refused to bargain with Meat Cutters Local 539, United Food and Commercial Workers International Union, AFL-CIO & CLC (herein the Union) after Respondent's takeover of certain food stores whose employees had been represented by the Union prior to the takeover by Respondent. Respondent filed an answer to the consolidated amended complaint denying the commission of any unfair labor practices and requesting that this matter be dismissed and returned to the Regional Director for Region 7 for proceedings under a previously filed petition for unit clarification. All parties were represented at the hearing, and following the hearing the General Counsel and Respondent filed briefs which have been duly considered.

On consideration of the entire record, and from my observations and the demeanor of each witness while testifying, and the briefs filed herein, I hereby make the following

FINDINGS AND CONCLUSIONS[1]

I. THE BUSINESS OF RESPONDENT[2]

Eberhard Foods, Inc. is a Michigan corporation with its principal office located at 4001 Three Mile Road, NW., Grand Rapids, Michigan. Respondent maintains other places of business in various cities in the western part of Michigan, where it is engaged in the retail sale of grocery, meat, produce, and related products. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Meat Cutters Local 539, United Food and Commercial Workers International Union, AFL-CIO & CLC, is a labor organization within the meaning of Section 2(5) of the Act.[3]

III. THE ALLEGED UNFAIR LABOR PRACTICES

Prior to July 1, 1981,[4] Respondent owned and operated 28 grocery stores throughout the western portion of Michigan, in the metropolitan areas of Grand Rapids, Muskegon, and Lansing, and in the cities of Holland, Lowell, Plainwell, Ludington, Cadillac, Ionia, Owosso, Manistee, and Big Rapids.

About July 1 Respondent purchased the physical assets of six grocery stores formerly operated by Buy-Low Thrifty Market of Niles, Michigan (herein Buy-Low). These six stores are located at Marshall, Sturgis, Three Rivers, Dowagiac, Cassopolis, and South Haven, Michigan. At the time of the sale the meat department employees in the Marshall and Sturgis stores were, and had been for a number of years, represented by Meat Cutters Local 539, the Charging Party in this proceed-

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

[2] In its posttrial brief the General Counsel conceded that there is insufficient evidence to support allegations in the amended consolidated complaint that Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to make contractual health and welfare contributions and by unilaterally changing the existing wage rate paid to employees. The General Counsel withdrew my request for a remedy in this regard. Accordingly, this Decision will deal only with Respondent's obligation, if any, to bargain with the Union on behalf of the employees involved.

[3] In 1979 the Retail Clerks International Association, AFL-CIO & CLC, and the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, merged into what is now known as United Food and Commercial Workers International Union, AFL-CIO & CLC.

[4] Unless otherwise indicated all dates refer to 1981.

ing. There was also a collective-bargaining agreement in existence at the time of the sale which purported to cover only the meat department employees in the Buy-Low Thrifty Market stores located at 124 East Green Street, Marshall, Michigan, and East Chicago Avenue, Sturgis, Michigan. All other employees at the Marshall and Sturgis stores, as well as all grocery department employees and meat department employees at the other four stores purchased by Respondent, were represented by Local 36 of the United Food and Commercial Workers Union, AFL-CIO & CLC. The record reflects that although Respondent acquired the six Buy-Low stores early in July, the effective date of the hiring of the employees was July 20. The record reflects that, of the eight employees, members of the Union, working in the meat markets in the Marshall and Sturgis stores, six of them were hired by the Respondent. It is clear from this record that the employees continued to perform the same functions that they had performed when they were employed by Buy-Low.

About September 14 Respondent purchased six grocery stores from Hamady Brothers Food Markets, Inc., of Flint, Michigan (herein referred to as Hamady). Five of these stores are located in the metropolitan area of Grand Rapids at 4500 Clyde Park, SW. 2755 Lake Michigan Drive, NW., 1625 Leonard, NE., 1800 44th Street, SE. and 3830 28th Street, SE. The sixth store is located in Hastings, Michigan. Prior to the sale the meat department employees in these 6 Hamady stores were covered by a collective-bargaining agreement with the Union, which collective-bargaining agreement covered approximately 23 grocery stores owned by Hamady in Western Michigan.[5]

Around September 10 after the Union learned of the pending sale, it requested that Respondent recognize and bargain with it as the exclusive bargaining representative for the employees in the meat department in the Hamady Brothers stores who would be or were going to be hired by Respondent.

The record reflects that of the 20 former employees of Hamady, members of the Union, in the meat departments in these 6 stores, all but three were hired by Respondent when it took over on and after September 14. Thus, Respondent retained a majority of the former Hamady employees and they continued to perform the same service for Respondent that they had performed for Hamady.

Discussion and Conclusions

The complaint alleges that although requested to do so, Respondent has refused to bargain with the Union as the exclusive representative of the employees in an appropriate unit composed of all employees in the meat department at Respondent's newly acquired stores at 124 East Green Street, Marshall, Michigan, and East Chicago Avenue, Sturgis, Michigan, and in an appropriate unit composed of all meat department employees in Respondent's newly acquired stores which it purchased from Hamady being the five stores in Grand Rapids, Michigan, and one store in Hastings, Michigan, as a successor to the operations of Buy-Low and Hamaday.

Respondent, among other things, contends that it has no obligation to bargain with the Union because (1) it is not a successor, (2) the Union has never made a demand for bargaining as alleged in the complaint, and (3) the General Counsel has failed to establish that the units as alleged in the complaint are appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

At the outset it is my conclusion that Respondent is a successor to both Buy-Low and Hamady. The record clearly reflects that Respondent took over these stores intact and hired a majority of the employees working in the stores and continued to operate the stores in substantially the same manner as was done by the predecessor employers.[6] While there may have been some change in the way Respondent promotes sales and displays its merchandise for the most part the operations of the grocery stores were done in the same manner as had been done by the predecessors.

The record reflects that Richard J. Phillips, president of Meat Cutters Local 539, in early August had a conversation with Michael Goodyear, the labor relations director of Respondent in Muskegon, Michigan. During this conversation Phillips asked Goodyear, "I would hope that you're coming to give me recognition for the stores in Sturgis and Marshall that you have just acquired" from Buy-Low. Goodyear indicated that he did not see a problem with that and stated that a meeting would be forthcoming regarding those matters. This testimony was not rebutted and it is credited by me. Therefore, it is my conclusion that the Union did make a demand for recognition on Respondent with regard to the unit composed of the meat department employees in the two former Buy-Low stores in Marshall and Sturgis, Michigan.

The record reflects that the employees in the meat departments of the two former Buy-Low stores were in a separate unit covered by a separate contract from the other employees in those two stores as well as the employees in the other four stores purchased by Respondent. Thus, it would appear that the history of bargaining with regard to these two stores was that the meat department constituted an appropriate separate unit covered by a separate contract. Therefore, in view of the bargaining history on a two-store basis, it is my conclusion that the General Counsel has established that a unit composed of the meat department employees in the two former Buy-Low stores constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act, and I so find.

Therefore, as I have concluded that Respondent is a successor to the former Buy-Low stores in Marshall and Sturgis, Michigan, and that the Union represented the employees in an appropriate unit prior to the takeover by Respondent and following the takeover made a request for bargaining which request has been refused by Re-

[5] The Union also represents other store employees of Hamady in the eastern half of Michigan.

[6] The Union's contract with Buy-Low and Hamady contained union-security provisions.

spondent, it is my conclusion that Respondent has violated Section 8(a)(5) of the Act in this regard.

It is also my conclusion that Respondent is a successor to the former Hamady stores. The record reflects that Respondent bought the six stores intact and, according to its own witness, it retained or hired a majority of the former employees of the six stores. The record also reflects that the business of Respondent and the work of the employees in the meat departments of the six stores remained basically the same after the purchase. The record also reflects that in a meeting with Respondent on September 10, Phillips made a demand for recognition upon Respondent for all the newly acquired Hamaday stores. Although at this time the formal transaction of transferring the store had not taken place, there is no question that the Union was demanding recognition for the employees when and if the transfer did take place. There was no question that Respondent was taking over the six Hamady stores and that it was offering employment to all of the former employees of Hamady. Therefore, it is my conclusion that the Union did make a demand for recognition as the collective-bargaining representative of the employees represented by it at the six former Hamady stores.

As indicated, Respondent also contends that a unit composed of the meat department employees at the five former Hamady stores in Grand Rapids, and the one store in Hastings, Michigan, is inappropriate for the purpose of collective bargaining. The record reflects that the Union represented all the meat department employees in all the retail stores of Hamady in the State of Michigan. The record reflects, however, that these were divided into two units, one composed of the employees in eastern Michigan and one composed of the employees in western Michigan, which covered the six former Hamady stores involved in these proceedings. This record also reflects that, around September 14, Hamady owned and operated approximately 35 to 45 retail stores in the State of Michigan employing approximately 250 employees. This apparently comprised the employees in both units as I have described above.

The contract between the Union and Hamady for the western part of Michigan covered approximately 23 to 25 Hamady stores. The five stores in Grand Rapids, and the one store in Hastings purchased by Respondent from Hamady, were a part of this overall unit. Thus, the history of bargaining as to these six stores was on a multistore basis composed of approximately 23 to 25 stores or composed of all the meat department employees of the employer in western Michigan. The unit presently alleged to be appropriate by the General Counsel is composed of all the meat department employees in five of these stores in Grand Rapids and one store some 20 miles away in Hastings, Michigan.

This record contains no evidence to indicate why a unit composed of the five stores in Grand Rapids and the one store in Hastings is an appropriate unit. The history of bargaining indicates that these stores were in a much broader unit composed of some 25 stores. Under the circumstances, it appears to me and that the General Counsel has failed to establish by a preponderance of evidence that the unit sought by the Union is an appropriate unit, and I so find. Therefore, it is my conclusion that the Respondent has not violated Section 8(a)(5) in its refusal to bargain with the Union in a unit composed of the six former Hamady stores. Accordingly, this 8(a)(5) allegation of the complaint shall be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The acts of Respondent as set forth above, occurring in connection with its business operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing the commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that the Board issue an order requiring Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including bargaining with the Union as the duly designated representative of Respondent's employees in the meat department at the newly acquired stores which it purchased from Buy-Low in Marshall and Sturgis, Michigan, in the appropriate unit as described above, effective from August 1981, the month in which the Union requested bargaining, at a time when it represented a majority of the employees in the appropriate unit.

On the basis of these findings of fact and on the entire record in this matter, I make the following

CONCLUSIONS OF LAW

1. Eberhard Foods, Inc., Respondent, is an employer within the meaning of Section 2(2) and is engaged in commerce as defined in Section 2(6) and (7) of the Act.

2. Meat Cutters Local 539, United Food and Commercial Workers International Union, AFL-CIO & CLC, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees who are engaged in receiving, cutting, grinding, slicing, carrying, displaying, repairing, processing, sealing, wrapping, bagging, pricing, prefabricating, and selling of all meat products; sausage, poultry, rabbits, fish and seafood products, canned hams, bacon, pork loins and picnics, whether such products are fresh, frozen, chilled, cooked, cured, smoked or barbecued, including those employees operating equipment used in wrapping, cubing and tenderizing of such meat products, and who perform their duties in all areas where such products are prepared, displayed and offered for resell in-service or self-service cases located in the employer's stores at 124 East Green Street, Marshall, Michigan and East Chicago Avenue, Sturgis, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act, and all other employees, constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. By failing or refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit,

Respondent has refused to bargain collectively in violation of Section 8(a)(5) and (1) of the Act.

5. By refusing to bargain with the Union as the exclusive bargaining representative of the meat department employees at the former Hamady Brothers stores which Respondent purchased on September 14, 1981, Respondent has not engaged in conduct violative of Section 8(a)(5) and (1) of the Act.

The above-described unfair labor practices affect commerce within the contemplation of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[7]

ORDER

The Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as exclusive bargaining representative of all the employees in the above-described appropriate unit at Respondent's stores in Marshall and Sturgis, Michigan.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Upon request, recognize and bargain with the Union as exclusive representative of all the employees in the above-described unit of its meat department employees at its store facilities in Marshall and Sturgis, Michigan.

(b) Post at its stores throughout the State of Michigan the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guarantted by Section 7 of the Act.

WE WILL, on request, recognize and bargain with Meat Cutters Local 539, United Food and Commercial Workers International Union, AFL-CIO & CLC, as the exclusive representative of all of our employees in the appropriate unit in the meat department of our newly acquired stores in Marshall and Sturgis, Michigan.

EBERHARD FOODS, INC.