

APPENDIX B

Joe Kurocki	Mario Martinez	Carlos M. Falcon
Dick Emerson	Rudy Alonso	Julian D'Costas
Santiago Valdes	Roger E. Scott	Roberto Martinez
Diego Garces	Ramon S. Pola	Ollie Scott
A Dario Jimenez	Adolfo Chao	Clinnie Brinson, Jr.
Gerardo Barreto	Arnaldo Silverio	Candido Sanchez
Orlando Rodriguez	Pedro Martinez	Artic Harris
Oswaldo Acosta	Rafael Fernandez	Ramon Sanchez
Jose S Martinez	Florencio Marrero	Pablo Garcia
Manuel Torres	Juan C. Moreno	Lugerico Lopez
Petro Beacham	Waldo Quesado	Evelio Machado
Miguel Rodriguez	Guillermo Mirabal	Ramon Pardo
Humbarto Fernandez	Luis Barandiaran	Armando Granado
Polho Torres	Adolfo Colombo	Jorge Machado
Vincente Garcia	Ovidio Ortega	Emiliano Sosa
Zoilo Gonzales	Angel Tamargo	Robustiano Gonzalez
Miguel Hernandez	Jose Ramirez	Jesus Diaz
Marcelino Cambra	Hector A. Ortiz	Gervasio Gomez
Jose Sarmiento	Daniel Menendez	Augusto Hernandez
Oswaldo Labrador	Jose R. Gort	Alcibiades Mujica
	Raul Martinez	

APPENDIX C

James Gentry-----	9/3/63	Roscoe Gibson-----	9/3/63
Charles B. Felton-----	9/3/63	Lawrence Cochran-----	9/3/63
Reynaldo Perez-----	9/4/63	Jesse Jones-----	9/3/63
Ardell Sykes-----	9/3/63	Frank Hartley-----	9/3/63
Otis Rawls-----	9/7/63	Peter Casey-----	9/3/63
Hanzel Baker-----	9/3/63	Grant Spence-----	9/3/63
Melvin Outler-----	9/3/63	James W. Brown-----	9/3/63
John Cummings-----	9/3/63	Alexander Mills-----	9/3/63
John Gordon, Jr-----	9/3/63	Frank Dabroski-----	9/3/63

APPENDIX D

Major Lee Garret	Raul Martinez Ehas	George Schwartz
Jose Santesteban	Rafael Freyre	Walter Collier
Manuel Casallas	Robert W. Foote	F. P. Enriquez

Columbus Building and Construction Trades Council, AFL-CIO and The Kroger Co.¹

Local Union No. 683, International Brotherhood of Electrical Workers, AFL-CIO and The Kroger Co.

Local Union #98, Sheet Metal Workers International Association, AFL-CIO and The Kroger Co.

Local Union #200, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and The Kroger Co.

Local #423, International Hod Carriers', Building and Common Laborers' Union of America, AFL-CIO and The Kroger Co.
Cases Nos. 9-CC-331-1, 9-CC-331-2, 9-CC-331-3, 9-CC-331-4, and 9-CC-331-5. November 30, 1964

DECISION AND ORDER

On February 27, 1964, Trial Examiner Samuel Ross issued his Decision in the above-entitled proceeding, finding that Respondents

¹ Herein called Kroger

had engaged in unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found Respondents had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, Respondents and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs. Kroger filed a brief in support of the Trial Examiner's Decision and an answering brief.

Pursuant to Section 3(b) of the Act, the Board has delegated its powers in connection with this proceeding to a three-member panel [Chairman McCulloch and Members Fanning and Jenkins].

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 and briefs, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent with the modifications herein.

The Trial Examiner found, and we agree,² that Respondents, by picketing and certain statements made by their agents, violated Section 8(b) (4) (i) and (ii) (B) of the Act as objects of such conduct were to force or require union subcontractors at the jobsite to cease doing business with Kroger, and to force or require Kroger to cease doing business with the builder-contractor, Schottenstein Co.,³ and thereby force or require the latter to cease doing business with Snyder, a nonunion subcontractor.

The Trial Examiner also found, and we agree, that Respondents by the foregoing conduct violated Section 8(b) (4) (i) and (ii) (A) of the Act as another object thereof was to force or require Kroger to enter into a "hot cargo" agreement with respondents proscribed by Section 8(e) of the Act. Respondents, relying on *Construction, Production & Maintenance Laborers Union, Local 383, et al. v. N.L.R.B.*, 323 F. 2d 422 (C.A. 9) (reversing *Colson and Stevens Construction Co., Inc.*, 137 NLRB 1650), contends that their conduct was saved from the reach of that section by virtue of the construction industry proviso to Section 8(e). That proviso permits "hot cargo" agreements "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction. . . ." [Emphasis supplied.]

² See *Northeastern Indiana Building and Construction Trades Council (Centlure Village Apartments)*, 148 NLRB 854; and *The Columbus Building and Construction Trades Council, AFL-CIO (Merchandise Properties, Inc.)*, 149 NLRB 82, wherein the Board held such conduct unlawful.

³ As indicated in the Trial Examiner's Decision, the builder contracted with Charles R. Snyder, Inc, herein called Snyder, for the construction of a new shopping center, most of which was to be leased to Kroger.

Although the Board recently overruled its *Colson and Stevens* doctrine⁴ and found picketing to be lawful for the purpose of obtaining "hot cargo" agreements permitted by the proviso, we find that the exemption for such agreements does not extend to the instant proceeding because Kroger is an operator of a chain of retail stores, and is not in the circumstances of this case "an employer in the construction industry," but was merely the prospective lessee of Schottenstein, the owner of the land on which the shopping center was to be built. As a key term of the 8(e) proviso has not been met, we find that Respondents violated Section 8(b)(4)(i) and (ii)(A) by their conduct in seeking a hot cargo agreement with Kroger.⁵

The Trial Examiner further found that Respondents did not engage in additional unfair labor practices within the meaning of Section 8(b)(4)(ii)(A) and (B) of the Act by the refusal of Respondents' Agent Waller on June 14 and 17, 1963, to refer carpenters for installation work for Kroger at its store in the shopping center. In so finding, the Trial Examiner distinguished the *Arthur Venneri Company* case⁶ wherein the Board found unlawful the union's refusal to refer employees to an employer with which it had a written hiring hall agreement. In addition, the Trial Examiner found that even under the test set forth by the Court of Appeals for the District of Columbia Circuit in enforcing⁷ the Board's decision in *Venneri*, namely, the employer's "dependence" upon the union for employees, the record does not establish that Kroger did in fact depend upon Respondents for carpenters. We disagree.

As found by the Trial Examiner, Kroger regularly employs carpenters who are members of Respondent Carpenters and pays such employees the standard wage rates of the Union in the area. Although Kroger was not a party to a collective-bargaining agreement with the Carpenters, the record shows that on each of 15 to 20 occasions during the 6 years preceding the refusal to refer on June 14

⁴ *Centivare Village Apartments, supra*

⁵ See Cong Rec, House, September 4, 1959, p 16635, wherein Representative Thompson listed as one of the major changes by the conferees to the Landrum-Griffin bill the granting of permission to "unions and prime contractors in construction industry to enter into agreements by which contractor refuses to subcontract to nonunion operators."

See also Senator Goldwater's statement in Cong Rec, Appendix—September 24, 1959, p A8359, that under Section 8(e) of the new legislation "a building trades union may enter into a contract with a contractor-building contractor—whereby he agrees that he will not let work to any subcontractor who is nonunion"

See *Local 585 of the Brotherhood of Painters, Decorators & Paper Hangers of America, AFL-CIO, et al (Falstaff Brewing Corporation)*, 144 NLRB 100, wherein the Board found that certain unions violated Section 8(e) of the Act by entering into an agreement concerning the terms of awards of construction work by the employer which operated a brewery

⁶ *Local 5, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO*, 137 NLRB 828

⁷ *Local No 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO v NLRB*, 321 F 2d 366, 370-371, cert denied 375 US 921.

and 17, 1963, the Carpenters always referred men to Kroger when so requested. We find, in substantial agreement with the General Counsel and the court in *Venneri* that the "essential element" is whether Carpenters had a practice of furnishing men to Kroger and not whether there is a written contract requiring the Carpenters to furnish men to Kroger. The course of conduct of the parties during the 6 years shows there is a hiring arrangement or practice between them. Thus, the requests by Kroger for men addressed to the Carpenters and the Carpenters' unvarying compliance therewith make it clear there was a referral system on which Kroger relied. Kroger's dependence upon the Carpenters was also demonstrated by the fact that Kroger was forced to cease work on the picketed premises until the Carpenters resumed the practice of furnishing men upon Kroger's request. Accordingly, we find, contrary to the Trial Examiner, that by the Carpenters' refusal to furnish men to Kroger on June 14 and 17, 1963, Respondents engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(A) and (B).⁸

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, with the following modifications, and orders that Respondents, their officers, agents, representatives, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order as modified below:

1. Omit from paragraph 1(a) of the Recommended Order and the corresponding parts of the notice the words, "or any other owner of property" and "or any other contractor."

2. Add the following after paragraph 1(b) of the Recommended Order:

"(c) Refusing to refer to The Kroger Company at its request individuals for employment as carpenters in order to force or require The Kroger Company to cease doing business with Schottenstein Company and force or require Schottenstein Company to cease doing business with Charles R. Snyder, Inc."

3. Add the following after the second indented paragraph in the notice:

WE WILL NOT refuse to refer to The Kroger Company at its request individuals for employment as carpenters in order to force or require The Kroger Company to cease doing business with Schottenstein Company and force or require Schottenstein Company to cease doing business with Charles R. Snyder, Inc.

⁸ As Member Fanning agrees with the Trial Examiner, he would find no violation for the reasons given by the Trial Examiner

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon a charge filed on June 18, 1963, and amended on June 20 and 26, 1963, by The Kroger Co., herein called Kroger,¹ the General Counsel of the National Labor Relations Board issued a complaint dated August 1, 1963, alleging that the Respondents, Columbus Building and Construction Trades Council, AFL-CIO, herein called Council; Local Union No. 683, International Brotherhood of Electrical Workers, AFL-CIO, herein called Electrical Workers; Local Union #98, Sheet Metal Workers International Association, AFL-CIO, herein called Sheet Metal Workers; Local Union #200, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called Carpenters; and Local #423, International Hod Carriers', Building and Common Laborers' Union of America, AFL-CIO, herein called Laborers, had engaged in and were engaging in unfair labor practices within the meaning of Section 8(b)(4)(i), (ii)(A) and (B) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, *et seq.*), herein called the Act. In general, the complaint alleges that Respondents engaged in improper common situs picketing at the construction site of a new Kroger store, and in threats and other oral inducements of secondary employees not to work thereat, and that objects of such conduct were to force or require various secondary employers to cease doing business with Kroger, to force or require Kroger to cease doing business with the lessor of its new store, to force or require the latter to cease doing business with a nonunion building contractor, and to force or require Kroger to enter into an agreement, prohibited by Section 8(e) of the Act, to use only union contractors in the construction of new stores. The Respondents filed an answer denying the substantive allegations of the complaint and the commission of unfair labor practices, and affirmatively alleging that their picketing was informational only and protected by the proviso to Section 8(b)(7)(C) of the Act.

Pursuant to due notice, a hearing was held before Trial Examiner Samuel Ross in Columbus, Ohio, on September 9 and 10, 1963. All parties were ably represented at the hearing by counsel and were afforded full opportunity to be heard, to present evidence, to examine and cross-examine witnesses, and to present oral argument. The General Counsel and the Respondents have filed briefs which have been carefully considered.

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

FINDINGS OF FACT

I. COMMERCE

Kroger, an Ohio corporation whose principal office is located at Cincinnati, Ohio, is engaged in the retail sale and distribution of foods, meats, and related products through retail food stores located in Ohio and other States of the United States. During the past year, a representative period, Kroger's gross sales exceeded \$1,000,000, and the value of its direct inflow of food, meats, and other products shipped in interstate commerce to its stores in Ohio from points outside the said State exceeded \$50,000.

Charles R. Snyder Construction Co., herein called Snyder, whose principal place of business is located in Columbus, Ohio, is engaged in the business of general contracting in the building and construction industry. During the past year, a representative period, Snyder purchased and received building material valued in the excess of \$50,000 which were shipped in interstate commerce to its place of business in Columbus, Ohio, from points and places located outside said State. During the same period, Snyder performed services in the State of Ohio valued in excess of \$50,000 for companies and enterprises which annually produce and ship merchandise valued in excess of \$50,000 directly to points outside the State of Ohio.

Ace Sign Erection and Service Corp., herein called Ace; Service Products, Inc., herein called Service Products; and Earl E. Bright, Inc., herein called Bright, are building contractors engaged in the building and construction industry at Columbus, Ohio, and vicinity.

The parties have stipulated to the foregoing facts, and that Kroger, Snyder, Ace, Service Products, and Bright are "employers" as defined in Section 2(2) of the Act, and that they are engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act. The Trial Examiner so finds.

¹The name of the Charging Party has been corrected pursuant to a motion granted at the hearing by consent.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties have also stipulated and the Trial Examiner finds that the Respondents Council, Electrical Workers, Sheet Metal Workers, Carpenters, and Laborers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Kroger operates a nationwide chain of retail food stores and supermarkets.² In the operation of its business, Kroger frequently selects sites for new supermarkets, negotiates for either the purchase or lease of such sites, and "oversee[s] the development of [the] [new] stores" by the contractors who are engaged either by it or the lessor to erect the new building. For many years, the Respondent Council has sought unsuccessfully to require Kroger and/or its lessors to use union general contractors who are signatories to contracts with the Council and/or its affiliates in the construction of such new stores.

In 1959, in connection with the construction of a new Kroger store at Lancaster, Ohio, by a lessor who used a nonunion general contractor, Respondent Council picketed the project. On that occasion, according to the credited testimony of Thomas Killeen, a real estate manager employed by Kroger, Killeen inquired of Philip O'Day, the secretary-treasurer of Respondent Council, what the Council wanted from Kroger to remove the picket line. O'Day replied that the Council wanted an "understanding" from Kroger, "which could be in letter form," that Kroger would "require [its] landlords to use union labor in the construction of [its] stores."

B. *The current dispute*

1. The selection and acquisition of the 12th Avenue site

The Respondent's instant dispute with Kroger arises out of the construction of a new store for Kroger's use by Snyder, a general contractor who is not a signatory to any collective-bargaining contract with the Respondents or their affiliated local unions,³ and whose employees are not members of or represented by any of such unions.

The site for the new shopping center at 12th Avenue in Columbus, Ohio, was selected by Kroger after its market study disclosed that it was feasible to operate a food market in that area. Following that market study in the latter part of 1961, Kroger arranged with a local realtor to acquire options to purchase the tract which then consisted of 12 separate properties. The options were secured by the realtor around May 1962, but Kroger decided not to buy the tract because the purchase price was too high. However, it suggested to the realtor that if an investor could be obtained who would build the shopping center, Kroger was willing to lease most of it for its own use and for Super-X Drug Co., a subsidiary of Kroger. At Kroger's suggestion, the realtor contacted and secured the agreement of Leon Schottenstein⁴ to purchase the property, a lease was entered into on July 9, 1962, between Kroger and Schottenstein Co., a corporation controlled by Schottenstein, and in September 1962 Schottenstein Co. purchased the properties which comprised the tract and then contracted with Snyder for the construction of the new shopping center.

2. The Council's demand on Kroger—Respondents' conduct during construction of the shopping center

In December 1962, Snyder commenced demolition of the existing buildings on the 12th Avenue tract. Thereafter, according to the credited testimony of Killeen, in January 1963,⁵ Respondents' admitted Agent O'Day advised Killeen by telephone that he had learned that Snyder was going to build the new Kroger store at 12th Avenue, that Snyder would not use union labor on the job, that "he wanted the Kroger Co. to intervene . . . to change the situation," and that unless Kroger "did something about

² *The Kroger Company*, 145 NLRB 235

³ The Respondent Council is composed of various local craft unions in the Columbus, Ohio, area, whose members are employed in the building and construction industry

⁴ Schottenstein had previously been a party to a similar arrangement with Kroger, as a consequence of which a store was built by Snyder at 1977 Cleveland Avenue, Columbus, Ohio, for Kroger to operate as lessee

⁵ All dates hereafter refer to 1963 unless otherwise specifically noted.

making this a union job" the Council would "post a banner that we were unfair to the local building trades unions." Killeen replied that the store was being built by Schottenstein, the owner of the property, and that Kroger had no control over whom Schottenstein used to build it.

Snyder continued with the construction of the new 12th Avenue shopping center. About March 1 the Respondent commenced picketing the construction site with a banner upon which the following legend appeared:

THIS JOB
UNFAIR
TO LOCAL UNIONS
AFFILIATED WITH THE
COLUMBUS BUILDING
and
CONSTRUCTION
TRADES COUNCIL
A. F. of L.
CIO⁶

According to the stipulation of the parties, the pickets walked all around the boundaries of the shopping center 5 days per week from Monday through Friday, from 7:30 a.m. until 4 p.m. Apparently, only one picket patrolled at a time. The picketing continued until August 6, when it was enjoined by the United States district court in a proceeding brought by the General Counsel under Section 10(1) of the Act.⁷

In addition to picketing the 12th Avenue shopping center, on several occasions in May the Respondent Council caused handbills to be distributed to passers-by in the vicinity of a number of other Kroger stores in Columbus. The handbills contained the following message:

PUBLIC! KNOW THE FACTS

The

KROGER GROCERY AND BAKING COMPANY

is leasing newly constructed storerooms which are being built with non-union construction labor. By doing so, the Kroger Co. is depriving union building tradesmen the opportunity to work on these storerooms.

Appeals to this Company requesting union labor be used on the construction work were of no avail. The attitude taken by this company lead us to believe they think small of us in the construction industry.

THE COLUMBUS BUILDING AND CONSTRUCTION TRADES COUNCIL THINKS THE PUBLIC SHOULD KNOW THIS

Until such time as the KROGER COMPANY changes the policy of their building program we urge you not to patronize this company.

DON'T BUY KROGER

The Respondent Council also inserted a full-page advertisement in the April 10 issue of the News-Tribune, the official newspaper of Columbus-Franklin County, AFL-CIO, which set forth almost in *haec verba* the same message contained in the handbills, and urged readers to "TELL YOUR FRIENDS ABOUT IT! THE DAILY PRESS WON'T." The advertisement also contained a copy of a letter which had been sent by the Council for Publication to the editors of two Columbus newspapers, but had not been used. The letter as it appeared in the advertisement, stated:

COLUMBUS BUILDING AND CONSTRUCTION TRADES COUNCIL
555 East Rich Street
COLUMBUS 15, OHIO

Affiliated with
AMERICAN FEDERATION OF LABOR
NATIONAL BUILDING AND CON-
STRUCTION TRADES DEPARTMENT

Affiliated with
OHIO STATE BUILDING AND
CONSTRUCTION TRADES
COUNCIL

⁶ Although the picket sign names only the Respondent Council, the stipulation of the parties admits the responsibility of all the Respondents for the picketing.

⁷ Only the picketing which occurred on and after June 17 is alleged to be in violation of the Act.

Dear Mr. Editor: I am addressing this to the "Letter to the Editor Department" hoping it will be printed for the benefit of workers who are members of organized labor. I am trying to show to them the attitude some of the supermarkets take toward members of labor unions.

On 12th Avenue, between Fourth and Summit Streets a storeroom, to be occupied by the Kroger Grocery and Baking Company is being built with non-union labor. Attempts have been made in the past to have this company see that the storerooms they will occupy are built with union labor, but to no avail. This is the third such storeroom to be built non-union that the Kroger Company has leased, two in the past twelve months.

I would like to indicate that I personally, as well as my family and union friends should notify this company that as long as they continue to operate under their present policy, we will attempt to have other members of organized labor patronize only business organizations which recognize our union policies.

Respectively [sic] yours,

Phil O'Day
Secretary-Treasurer

POD/nm

The ad concluded with the message:

**DON'T BUY KROGER
COLUMBUS BUILDING AND CONSTRUCTION
TRADES COUNCIL⁸**

**3. Respondents' conduct on and after the completion of the construction
of Kroger's store**

According to Killeen's uncontraverted and credited testimony, on or about June 5 he notified Respondents' Agent O'Day that Snyder's work at Kroger's 12th Avenue store would be completed by June 15, that Kroger intended to dispatch its own union employees to the store on Monday, June 17, to install equipment and fixtures, that three union "subcontractors" were also scheduled to start work for Kroger on that day, and that Kroger expected the Respondents to remove their picket line because there would be nothing but union labor at the store. O'Day replied that he was surprised that Kroger expected the Respondent to remove the picket line, that Kroger "had not cooperated with the Trades Council in encouraging the landlord to use union labor," and that the picket would remain until Kroger "took injunctive action to get the picket removed." O'Day further stated that Kroger could also expect that if its further projects were "built with nonunion labor . . . even though the store was leased, a picket would be put back on the site, or on the new site." O'Day also told Killeen that although Kroger might be successful in removing the picket line by an injunction, it could not prevent the Council from handbilling, and that in addition to the 10,000 handbills already "put out," "they were having 5,000 more printed and distributed." Killeen replied that Kroger "could not dictate to . . . the developers" regarding their choice of contractor.

Early in June, Kroger employees William Belt and Leslie Meenach, members of Respondent Carpenters, by chance encountered three of the officials of their union in a restaurant.⁹ In the ensuing conversation, Belt and Meenach in substance asked whether the picketing of the 12th Avenue project would continue after the store was turned over to Kroger, and whether they would be "able to get in on the . . . job [to work]." One of the union officials¹⁰ replied, in effect, that the picketing would continue as long as possible, and that the chances of Belt and Meenach working there "didn't look very favorable." Then, referring to a prior occasion when he and Belt had been fined by Respondent Carpenters for working in a Kroger store at Lancaster, Ohio, which was being picketed by Respondent Council, Meenach said, "I can't afford to get into any more mix ups, and if there is a picket on there, I will have to stay out." Long replied, "Well, you know what happened before."

On Monday, June 17, Snyder turned over the keys to the 12th Avenue Kroger store to Edgar Hiser, Kroger's division engineer. On that day, Snyder had employees working in the Super-X storeroom, and completing the surface of the parking lot of

⁸ Neither the handbilling nor the newspaper advertisement are alleged as violations of the Act. The testimony regarding them was offered and received to show the object of Respondents' picketing and other conduct which is alleged to be violative of the Act.

⁹ President Marcus Long, Recording Secretary Joe Kenny, and Assistant Business Agent Roy Reed.

¹⁰ Meenach did not recall which of the union officials made the reply. Belt attributed the response to Record Secretary Kenny.

the shopping center. They finished work that day. Thereafter, no employees of Snyder worked at the 12th Avenue shopping center until August 10.¹¹ However, the picketing of the entire shopping center with the signs previously quoted continued on and after June 17 in the same manner as theretofore, and included patrolling portions of the project where Snyder had no further work to perform.

On the morning of June 17, four Kroger carpenters, all members of Respondent Carpenters, came to the shopping center to work in the Kroger store. After observing the picket, Kroger's Carpenter Foreman Belt called his union's office, and had a conversation with Respondents' admitted Agent Waller. Belt asked Waller to send him two additional carpenters to work for Kroger at the 12th Avenue store. Waller inquired whether the picket was still there and Belt answered in the affirmative. Waller then refused to send any more men. Belt then inquired what he and the other three Kroger carpenters were "supposed to do." Waller replied, "You know what you are supposed to do." Belt regarded this as meaning that they were not supposed to work since, as noted above, he and Meenach had previously been fined for crossing a similar picket line of Respondent Council. Accordingly, he and the other three carpenters refused to work at the project.¹²

In addition to the four Kroger carpenters, employees of a number of contractors engaged by Kroger appeared at the 12th Avenue store on June 17 to perform work for their employers. As a consequence of Respondents' picketing and other conduct hereinafter described, they all either refused to work or quit working shortly after they started.

Bright was engaged by Kroger to install a sheet metal hood on the roof of the Kroger store above the compressor room. Its employees are represented by and members of Respondent Sheet Metal Workers. On the morning of June 17, two of Bright's employees, Cantrell and Sparks, drove to the rear of the shopping center and unloaded the material for the job without seeing the picket. After working on the roof for a short time, Sparks came down to confer with Kroger's Foreman Belt, and then saw the picket for the first time. After first talking to his employer, Sparks called the union on the telephone several times and asked the secretary who works in the office to connect him with one of the business agents. On each such occasion he was advised that none of them were in. Finally Sparks told the secretary, whose voice he recognized and whose name he knew to be Cecile, that he was at the Kroger site on 12th Avenue, that there was a picket there, and that he wanted information. The secretary instructed him to wait around and she would try to contact Boggs, the business agent of Respondent Sheet Metal Workers and an admitted agent of all the Respondents. About 10 or 11 minutes later the secretary called Sparks and said "that if there was a banner on the job we were not supposed to cross it." Sparks conveyed the information to Cantrell and the two then left the jobsite.¹³ They did not thereafter return to the store to complete their work until after the Section 10(1) injunction order issued.

Service Products had a contract with Kroger to insulate the floors of the panel coolers. Its employees, except for a truckdriver who is a member of Teamsters Local 413, are represented by Local 44, International Association of Heat and Frost Insulators, an affiliate of Respondent Council. On June 17, Service Products dispatched truckdriver Noeth to the Kroger store with insulation materials required for its job. Upon arrival at the jobsite, Noeth observed the picket and telephoned Gene King, the installation manager and field superintendent for Service Products, for instruction on what to do. King advised Noeth to wait while he checked with Respondent Council. While waiting for King to call back, Noeth asked the picket, "Can I cross the line to deliver to Kroger's?" The picket replied, "No, sir, the job is picketed." Meanwhile, King called Respondents' Agent O'Day, told him that Service Products had a contract with Kroger, and asked him whether "the banner was sanctioned." O'Day replied that it was, that there was "a non-union contractor on the site." King then instructed Noeth to bring the materials back to the warehouse. Service Products' contract was completed after the injunction was obtained.

¹¹ The building of the shopping center was completed on June 17, but Snyder still had work to do under a separate contract with Swan Cleaners, the lessee of one of the stores, and was waiting for delivery of equipment to complete this work.

¹² They were then assigned other work by Kroger. On Friday, June 21, these four Kroger carpenters were laid off for lack of work after they again refused to work behind the picket line at the 12th Avenue project because of fear of reprisal by the Respondent Carpenters. They were recalled to work after the temporary injunction was obtained on August 6.

¹³ The foregoing findings are based on the uncontradicted testimony of Sparks and Cantrell. Neither the secretary nor Boggs was called by the Respondents to testify.

Ace had a contract with Kroger to erect a sign at the store. Its employees are members of and represented by Respondent Electrical Workers. On June 17 Ace assigned Richard Sampson, a sign erector and member of Respondent Electrical Workers, to start erection of the sign. Sampson arrived at the project that morning, saw the picket, but nevertheless commenced digging a post hole for the sign which was to be erected. While thus engaged, Sampson was accosted by James Golden, assistant business agent of Respondent Electrical Workers and the admitted agent of all the Respondents, who asked Sampson if he knew that he had crossed the picket line. Sampson replied in the affirmative. Golden asked why he had done so. Sampson replied that his boss, Dellenbach, had called the union hall and that as far as he knew Dellenbach "had the go-ahead on the job." Golden replied that he had told Dellenbach "not to go near the job," and had warned Dellenbach that if he went ahead with it Golden "would pull his contract [with the Union]." Golden also asked Sampson "if I knew that I could get in trouble if I crossed the picket line." Sampson replied, "Well, if I crossed the picket line, I will pull off the job." Thereupon, Sampson left the site. The sign was subsequently erected after the injunction was obtained.¹⁴

The initial charge against Respondent Council in the instant case was filed by Kroger on June 18, and a copy was received by the Council on June 21. Thereafter, about June 26, the signs which were used in picketing the shopping center was changed, and the new signs used thereafter stated as follows:

The Contractor
Doing the Work
On this
BUILDING
Is
UNFAIR
To The
Columbus Building and
Construction Trades Council
AFL-CIO
This Banner Is For
Public Information Only

On June 28 Respondent Council sent the following telegram to all of its affiliated local unions:

TO ALL AFFILIATES:

This is to inform you that an informational banner is being displayed on a building on East 12th Avenue between Summit and Fourth Streets. The purpose of the banner is for public information and not to stop your members from working there.

Fraternally yours,

Phil O'Day
Secretary Treasurer
Columbus Building & Const.
Trades Council

After the change in the Respondents' picket signs, Kroger's Carpenter Foreman Belt telephoned Respondents' Agent Waller, and told him that he "had been laid off by the Kroger Company and was desirous of getting back to work," and asked Waller whether in view of the changed picket signs he and the other Kroger carpenters "could go back to work [at the 12th Avenue project] or if we would be under the threat of a fine" for so doing. Waller responded, "I cannot answer any questions." Belt persisted and asked Waller what he should do. Waller merely repeated, "I cannot answer any questions."¹⁵

C. Analysis of the testimony and concluding findings

1. The applicable statutory provisions and principles

As previously noted, the complaint alleges that the Respondents' unlawful conduct consisted of: (1) the picketing of the 12th Avenue shopping center on and after June 17; (2) the oral inducement of employees of Kroger, Ace, Bright, and Service

¹⁴ Golden was not called by the Respondents to testify.

¹⁵ The above findings are based on Belt's uncontradicted testimony. Waller was not called as a witness by Respondents

Products not to work at the picketed premises; and (3) the refusal to refer carpenters to work for Kroger at the shopping center. The objects of this unlawful conduct, according to the complaint, were: (a) to force or require Kroger to enter into an agreement prohibited by Section 3(e) of the Act; (b) to force or require Act, Bright, and Service Products to cease doing business with Kroger; and (c) to force or require Kroger to cease doing business with Schottenstein and thereby to force the latter to cease doing business with Snyder.

Section 8(b)(4)(i), (ii)(A) and (B),¹⁶ insofar as here relevant, prohibits unions or their agents from inducing employees of secondary or neutral employers to refuse to handle goods or perform services, and from threatening, restraining, or coercing secondary employers, where an object of such conduct is to force or require any employer to enter into an agreement prohibited by Section 8(e) of the Act, or to force or require a secondary employer to cease doing business with the primary or disputing employer. As the Board and the courts have repeatedly pointed out, these provisions are aimed at "shielding unoffending employers and others from pressures in controversies not their own."¹⁷ These sections of the Act are generally referred to as the secondary boycott provisions. As stated by Learned Hand, Chief Judge of the Court of Appeals, Second Circuit:¹⁸

The gravamen of a secondary boycott is that its sanctions bear, not upon the Employer who alone is a party to the dispute, but upon some third party who has no concern in it.

Where, as here, picketing takes place at a common work situs—at which both secondary employers and the primary employer do business—it is often difficult to determine whether the picketing has a primary or secondary objective. To assist in making this determination, the Board formulated certain evidentiary guides in the *Moore Dry Dock* case,¹⁹ which, as the Supreme Court recently noted, "were widely accepted by reviewing federal courts."²⁰ Under these criteria common situs picketing will be considered primary and deemed directed against the disputing employer rather than the secondary employer, if.

(1) The picketing is strictly limited to times when the situs of the dispute is located at the picketed premises; (2) at the time of the picketing the primary employer is engaged in its normal business at the situs; (3) picketing is limited to places reasonably close to the situs of the dispute; and (4) the picketing discloses clearly that the dispute is with the primary employer.

To be sure, as the Board recently stated in *Plauche Electric*,²¹ these standards "are not to be applied on an indiscriminate 'per se' basis." For, the totality of the union's

¹⁶ Section 8(b)(4)(i), (ii)(A) and (B) of the Act provides as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is

(A) forcing or requiring any employer or self-employed person . . . to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing

¹⁷ *N.L.R.B. v. Denver Building and Construction Trades Council, et al (Gould & Preisner)*, 341 U.S. 675, 692; see also *Superior Derrick Corp. v. N.L.R.B.*, 273 F. 2d 891, 893 (C.A. 5), cert. denied 364 U.S. 816, *N.L.R.B. v. Laundry, Linen Supply & Dry Cleaning Drivers, Local 928 (Southern Service Co.)*, 262 F. 2d 617, 619 (C.A. 9).

¹⁸ *International Brotherhood of Electrical Workers, Local 501, et al. (Samuel Langer) v. N.L.R.B.*, 181 F. 2d 34, 37 (C.A. 2), aff'd. 341 U.S. 694.

¹⁹ *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547, 549.

²⁰ *Local 761, International Union of Electrical, Radio and Machine Workers, AFL—CIO (General Electric Company) v. N.L.R.B.*, 366 U.S. 667, 677.

²¹ *International Brotherhood of Electrical Workers, Local Union 861, etc. (Plauche Electric, Inc.)*, 135 NLRB 250.

conduct in a given situation may well disclose a real purpose to enmesh neutrals in a dispute, despite literal compliance with the *Moore Dry Dock* standards.²² By the same token, a minor deviation from these standards may not be sufficient to establish a secondary objective.²³ But compliance or noncompliance with the *Moore Dry Dock* criteria will normally shed light on the union's true objective. At the very least, noncompliance with the standards justified a presumption or inference that the picketing at the mixed situs has an illegal secondary object. And once the illegal object is established, the picketing becomes unlawful under Section 8(b)(4) if it is further shown that it operated to induce or encourage secondary employees, or to threaten, coerce, or restrain secondary employers

2. Conclusions regarding the primary and secondary employers herein

In the light of the foregoing principles, the initial question posed is to determine which is the primary employer or person in this case against whom the Respondent may lawfully engage in a "primary strike or primary picketing" under the proviso to Section 8(b)(4)(B), and which, if any, are the secondary employers who may not be restrained or coerced and whose employees may not be induced to engage in strikes or refusals to work.

The record shows that the basic objective of the Respondents was to require the construction of new Kroger stores to be performed by contractors who employed members of the local unions affiliated with the Respondent Council. The record also shows that on the picketed jobsite, only Snyder used employees who were not members of the Respondents or their affiliates, since all of the other employers, Kroger, Ace, Bright, and Service Products, employed only such union members. The undisputed testimony of Snyder shows that on a number of occasions in the past, and as recently as May or June 1963, Respondent Council attempted to persuade Snyder to "operate as a union contractor." Until June 17, Snyder was the only contractor whose employees were working on the job." Thus, it is quite obvious that the "job" was designated as "unfair" on the Respondents' original picket sign only because of the presence of Snyder's nonunion employees at the jobsite. Accordingly the Trial Examiner concludes that Snyder is the primary employer in this case.

The record discloses no dispute between either Ace, Bright, or Service Products and the Respondents, and the latter make no contention that said employers are other than secondary. Kroger's only connection with the instant dispute is that it is the lessee of premises which the owner is building through a nonunion general contractor. Thus, it is quite apparent that Kroger also is a secondary employer in respect to the picketing and other conduct charged as violations herein.

However, the Respondents contend that Kroger is "not a neutral party" in this dispute and should be regarded as a primary employer. The Respondents' contention, based on the negotiations incident to the acquisition of the 12th Avenue site, is that Kroger, in effect, controls the property, and either could have designated a union contractor to build it, or influenced Schottenstein, the owner, to use a union contractor. However, even assuming *arguendo* that the record supported the conclusion that Kroger did or could have controlled the selection of the general contractor, and there is no such evidence, it would avail the Respondents nothing, since the only dispute with Kroger would still be the secondary one, that Kroger did business with nonunion rather than union contractors.²⁴ The Trial Examiner therefore concludes that Ace, Bright, Service Products, and Kroger are the secondary employers in this case.

3. Inducement and encouragement of neutral employees to refuse to perform services

Viewed in the light of the above findings, it is apparent that on and after June 17, when employees of secondary employers as well as those of Snyder, the primary employer, were scheduled to work, a fact of which the Respondents had been forewarned, the 12th Avenue project became a common situs within the meaning of

²² See *N.L.R.B. v. Highway Truckdrivers and Helpers Local No. 107, International Brotherhood of Teamsters, etc. (Riss & Co)*, 300 F. 2d 317, 321-322 (C.A. 3).

²³ See *Plauche Electric, supra*, where the Board, in holding that a minor departure from one of the *Moore Dry Dock* standards did not operate to invalidate the picketing, aptly stated: "The standard . . . is to be applied with common sense. It is not to be interpreted in the absurd manner suggested."

²⁴ *N.L.R.B. v. Denver Building and Construction Trades Council, et al. (Gould & Preisner)*, *supra*, at 688-689.

Moore Dry Dock and, therefore, it was incumbent upon the Respondents to so conduct their picketing that it would be clear to all that it was directed only against the primary employer, Snyder, and its employees.

This the Respondents failed to do in a number of respects. The first picket sign (used until June 26), which stated that the "job" was "unfair," obviously did not disclose that the Respondents' dispute was only with Snyder. The later picket sign, which stated that "the contractor doing the work on this building is unfair," retained the same infirmity since there were a number of contractors working on the building and the sign failed to designate which of them was "unfair." Moreover, although Snyder's work on the building was completed and it had no employees on the site after June 17, the Respondents continued to picket the entire shopping center.²⁵ Thus, the Respondents failed to conform with any of the *Moore Dry Dock* standards for lawful common situs picketing, and quite obviously never intended to confine the impact of its picketing to Snyder and its employees alone.

In addition to the failure of the Respondents to picket the common situs in accordance with the *Moore Dry Dock* criteria, the intention of the Respondents to enmesh secondary employers and their employees in their dispute with Snyder is quite evident from their conduct. Thus, the picket told Noeth, the truckdriver employed by Service Products, that he could not cross the line to deliver to Kroger. Golden, the agent of Respondents, induced Sampson, an employee of Ace, to quit work by asking him if he [Sampson] knew he could get in trouble by crossing the picket line. Sparks and Cantrell, employees of Bright, were induced to quit work by the secretary in the office of Respondent Sheet Metal Workers, apparently after consultation with Boggs, an agent of Respondents, by her statement to them "that if there was a banner on the job we were not supposed to cross it"²⁶ Kroger's carpenters were induced to refuse to work by the not too subtle suggestion that they might be subject to fines if they crossed the picket line. And finally, the Respondents refused to refer carpenters to work for Kroger at the picketed site. All of the foregoing clearly discloses that the Respondents' picketing of the 12th Avenue site was not limited to Snyder, the primary employer, nor intended to be so limited, as required in common situs situations.

The Respondents contend that their picketing of the project was "purely informational" and lawful under the second proviso to Section 8(b)(7)(C) of the Act. This contention is based on the testimony of Respondents' Agent O'Day that the original picket sign, which contained no reference to its alleged informational character, was used erroneously, that when the error was discovered, a corrected picket sign was substituted on June 26 and a telegram was sent to all the affiliates of the Council that the picketing was "for public information and not to stop your members from working." Even assuming this contention had legal merit, the Trial Examiner considers it as without evidentiary support. The testimony that the first sign was used erroneously is regarded as unworthy of belief for the following reasons: The sign was used without change for almost 4 months. It was not changed until after the charge of unfair labor practices was filed and served in this case. The telegram to the affiliates did not state that the earlier picket sign had been used erroneously, or that it had been intended as informational only. Moreover, the Respondents' oral inducement of employees of Kroger, Ace, Bright, and Service Products not to work at the picketed site, and their refusal to refer employees to Kroger to work there, contradict the testimony that the picketing with the first sign was intended to be "informational" only.

Nor does the record support the conclusion that the later picketing with the new signs was "informational." In this regard, it is significant that when Kroger's Carpenter Foreman Belt inquired of Respondents' Agent Waller whether, in the light of the new picket sign, he and the other Kroger carpenters could work at the shopping center without being subjected to fines, Waller replied, "I cannot answer," a response inconsistent with the alleged "informational" nature of the picketing.²⁷ For all the foregoing reasons, the Trial Examiner rejects, as without factual support, the contention that the picketing of the 12th Avenue shopping center was intended "for public information only."

²⁵ Even assuming *arguendo* that notwithstanding the absence of Snyder's employees, the Respondents had the right to picket the Swan Cleaners storeroom because Snyder had some work to do there in the future, they did not limit their picketing to that store.

²⁶ In the context of the admitted responsibility of Respondent Sheet Metal Workers for the picketing, and the failure of either Boggs or the secretary to testify, I conclude that a *prima facie* showing was made that the secretary was an agent of the Union, at least for the transmission of the message that members were not supposed to cross their own picket line.

²⁷ Cf. *International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America, Subordinate Lodge No 92; etc. (Richfield Oil Corporation)*, 95 NLRB 1191.

Moreover, even assuming *arguendo* that the Respondents' picketing was "informational," since "an effect" thereof was "to induce individual[s] employed by . . . other person[s] . . . not to perform services," the proviso to Section 8(b)(4) did not immunize the Respondents' picketing.²⁸ Furthermore, the Board has held that the proviso to Section 8(b)(7)(C) is limited to cases involving charges of that particular subsection of the Act.²⁹ It obviously follows that the proviso is not applicable to Section 8(b)(4) cases. Finally, since the proviso to Section 8(b)(4) permits only "publicity other than picketing," it is fairly evident that picketing, even that which is informational in nature, is not protected by the proviso when the charge involved is inducement, restraint, or coercion in violation of Section 8(b)(4)(i) or (ii).³⁰

The "normal purpose of a picket line is to persuade employees not to cross it."³¹ Accordingly, the Trial Examiner concludes that by the said picketing, and by their oral inducements of employees of Kroger, Ace, Service Products, and Bright, not to work at the picketed site, the Respondents induced and encouraged individuals employed by secondary employers to refuse to perform services within the meaning of Section 8(b)(4)(i) of the Act.

4 Interference, restraint, and coercion

As noted above, the picketing and oral inducement of the employees of Kroger, Ace, Bright, and Service Products resulted in the refusal of said employees to work at the picketed site, and thus prevented their employers from carrying on normal business at the premises until an injunction was obtained by the General Counsel. The Trial Examiner therefore concludes the Respondents thereby also engaged in interference, restraint, and coercion of secondary employers within the meaning of Section 8(b)(4)(ii) of the Act.³²

The complaint alleges and the General Counsel contends that the Respondents engaged in further interference, restraint, and coercion within the meaning of Section 8(b)(4)(ii) of the Act by the refusal of Respondents' Agent Waller to refer carpenters to work for Kroger at the 12th Avenue shopping center. The record in respect to this issue discloses the following:

Kroger regularly employs carpenters who are members of Respondent Carpenters, and pays such employees the standards wage rates of the Union in the local area. Kroger is not a party to any collective-bargaining agreement with the Carpenters, and there is no evidence of any arrangement or understanding between them which requires either that Kroger hire its carpenter employees through the Union or that the Union refer carpenters to Kroger on request. However, during the past 5 or 6 years, Kroger has called the Respondent Carpenters whenever it needed additional men, and the Union has referred carpenters to Kroger whenever so requested. According to Kroger's Carpenter Foreman Belt, this has occurred about 15 or 20 times during that period. As noted above, about June 14 and 17, Belt requested Respondents' Agent Waller to furnish two additional carpenters to work for Kroger at the 12th Avenue shopping center and Waller refused to do so.

In his brief on this issue, the General Counsel contends that "the essential element [of the alleged violation] is the fact that . . . Kroger was dependent upon the employees received from Respondent," and that a written hiring agreement is not necessary to support the violation. In this connection, the General Counsel cites the *Arthur Venneri* decision of the Board,³³ enforced by the Court of Appeals for the

²⁸ *Local 3, International Brotherhood of Electrical Workers, AFL-CIO (Jack Picoult)*, 144 NLRB 5.

²⁹ *Retail Store Employees' Union Local No. 692, Retail Clerks International Association, AFL-CIO (Irvin, Inc.)*, 134 NLRB 686, 698 (footnote 5); *Local 182, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Woodward Motors, Inc.)*, 135 NLRB 851 (footnote 1).

³⁰ *Cf. Fruit & Vegetable Packers & Warehousemen, Local 760, et al. (Tree Fruits Labor Relations Committee, Inc.)*, 132 NLRB 1172.

³¹ *N.L.R.B. v. Dallas General Drivers Local 745*, 264 F. 2d 642, 648 (C.A. 5)

³² See *International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1140, AFL-CIO (Gilmore Construction Company)*, 127 NLRB 541; *General Drivers, Chauffeurs and Helpers, Local Union No. 886, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Ada Transit Mtx)*, 130 NLRB 788, 793; *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 575, AFL-CIO (Boulder Master Plumbers Association)*, 132 NLRB 1355.

³³ *Local 5, United Association of Journeymen, etc.*, 137 NLRB 828, 830.

District of Columbia,³⁴ in which the Board found that a union's refusal to refer employees to an employer constituted coercion and restraint within the meaning of Section 8(b)(4)(ii) of the Act.³⁵ More specifically, the General Counsel relies on the language of the court of appeals, in enforcing the Board's *Veneri* decision, wherein the court stated,

[The Employer] was in fact dependent upon the union for employees and the union's refusal [to refer employees] under such circumstances was to "coerce or restrain," within the meaning of the Act.

However, the *Veneri* and other cases cited above involved refusal by unions to refer employees to employers with whom the union had written hiring hall agreements, and in the instant case, there is not only no written hiring hall agreement between Kroger and Respondent Carpenters, but also no evidence of any oral arrangement or understanding between them that Kroger would hire its carpenter employees through the union or that the union would refer carpenters to Kroger on request. Moreover, there is also no evidence that Kroger could not hire carpenters through other sources and, thus, the record does not establish that Kroger was "dependent upon the Union" for such employees. In the light of the foregoing, the Trial Examiner finds that the evidence is insufficient to support the conclusion that the Respondents, by their refusal to refer carpenters to Kroger, restrained or coerced it within the meaning of Section 8(b)(4)(ii) of the Act.³⁶

5. The objects of Respondents' conduct

As previously noted, the complaint alleges that objects of Respondents' picketing and other conduct already found to be encompassed within the meaning of Section 8(b)(4)(i) and (ii) of the Act, were: (a) To force or require Kroger to enter into an agreement prohibited by Section 8(e) of the Act;³⁷ (b) to force or require Ace, Bright, and Service Products to cease doing business with Kroger; and (c) to force or require Kroger to cease doing business with Schottenstein and thereby to force or require the latter to cease doing business with Snyder

Regarding these alleged objectives of the Respondents' conduct, the record discloses the following: (1) In January 1963, Respondents' Agent O'Day threatened that unless Kroger "did something about making this [the 12th Avenue shopping center] a union job," the Council would "post a banner that we [Kroger] were unfair to the local building trade unions;" (2) in May 1963, the Respondent Council distributed handbills at a number of Kroger's stores, which stated that "until such time as the Kroger Company changes the policy of their building program," which was described as having their stores built with "non-union construction labor," "we urge you not to patronize this company;" (3) on April 10, 1963, the Respondent Council, in an advertisement in the News Tribune, stated that Kroger's store at 12th Avenue is the "third" which has, and "is being built [for Kroger] with non-union labor," and urged friends of labor not to patronize Kroger until it changed its building policies and used union labor in the construction of its stores; (4) on June 5, 1963, Respondents' Agent O'Day told Kroger's Real Estate Manager Killeen that Respondents would not remove the picket line at the 12th Avenue Store because Kroger "had not cooperated with the Trades Council in encouraging the landlord to use union labor;" (5) in the same conversation, O'Day threatened that although picketing of the store might be successfully enjoined, that would not prevent the Respondents from further

³⁴ *Local No. 5, United Association of Journeymen, etc. v. NLRB*, 321 F. 2d 366, 370-371

³⁵ Accord: *Local 756, International Brotherhood of Electrical Workers, AFL-CIO, et al (The Martin Company)*, 131 NLRB 1010, 1011, 1019-1020; *Local 825, International Union of Operating Engineers, AFL-CIO (R. G. Maupai Co., Inc)*, 135 NLRB 578.

³⁶ *Local No. 5, United Association of Journeymen, etc. v. NLRB*, *supra*.

³⁷ Section 8(e) provides, in pertinent part, as follows:

It shall be an unfair labor practice for any labor organization and any employer to enter into, any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void

handbilling the Kroger's stores, and that preparations for such handbilling were being made; and (6) finally, on and after June 17, although the construction of Kroger's store had been completed by Snyder, and only union employees working for Kroger and the latter's "subcontractors" were at the site, Respondents continued their picketing of Kroger's store, and, in addition, induced the union employees to refuse to work for Kroger and its "subcontractors." In this connection, it is significant that although Synder, the non-union primary employer, was currently engaged on a number of other construction projects, Respondents did not picket any of them.

All of the foregoing persuasively requires the conclusion that the Respondents' conduct was directed primarily at Kroger, a secondary employer, to force or require it to "change the policy of its building program," by using, either directly or through its landlords, only union construction contractors. Quite obviously, to accomplish that objective of Respondents, Kroger would be required to cease doing business directly or indirectly with nonunion construction contractors.

Thus, the only real question is whether the evidence is sufficient to establish that the Respondent sought thereby to force or require Kroger "to enter into any contract or agreement, express or implied" to that effect. There is no evidence in the record that the Respondents have made any recent request of Kroger for such an agreement in writing.³⁸ However, Section 8(e) contains no requirement that the proscribed agreement must be in writing. On the contrary, the very use of the alternative words in that section, "contract or agreement," and "express or implied," persuasively negates any conclusion that the proscribed agreement must be attended by any particular formality. Accordingly, it would appear sufficient that to establish the Section 8(e) objective, all that is required is that the evidence disclose that an object of Respondents' conduct was to force or require Kroger to agree that it would cease doing business with nonunion building contractors, either directly or through landlords. That objective is clearly disclosed by the documentary evidence in the case. Thus, the handbills of the Respondent Council states, "Appeals to this Company requesting union labor to be used on the construction work were of no avail." Furthermore, the Council's letter to the newspapers stated, "Attempts have been made in the past to have the company see that the storerooms they will occupy are built with union labor, but to no avail." These references to prior appeals to Kroger to change its building "policies" quite apparently included the Respondents' 1959 request for an "understanding," "which could be in letter form," that union labor would be used in the construction of Kroger's stores. In any event, the current drive to compel Kroger to change its past construction policies, requires the conclusion that Respondents are seeking at least an oral agreement or commitment from Kroger to use union construction labor in the future, and thereby to agree to cease doing business with nonunion construction contractors. The Trial Examiner therefore concludes that an object of the Respondents' picketing and other conduct on and after June 17 was and is for the objective of forcing or requiring Kroger to enter into an agreement proscribed by Section 8(e) of the Act.

The record also clearly discloses that the Respondents sought to attain the foregoing objective by forcing or requiring contractors engaged by Kroger to cease doing business with it. The Respondents obviously sought thereby to force Kroger to change "its building policy," or in other words, to cease doing business with landlords or owners who use nonunion contractors for their construction work, or to force or require such landlords or owners to cease doing business with nonunion construction contractors. Accordingly, the Trial Examiner concludes that additional objects of Respondents' picketing and other conduct described above were and are to force or require Ace, Bright, and Service Products to cease doing business with Kroger, to force or require Kroger to cease doing business with Schottenstein, and to force or require Schottenstein to cease doing business with Snyder.

For all the foregoing reasons, the Trial Examiner finds and concludes that the Respondents, by picketing the 12th Avenue shopping center on and after June 17, and by their oral inducement of employees of Kroger, Ace, Bright, and Service Products

³⁸ As found above, in 1959, in connection with a similar dispute involving the construction of a new store for Kroger by a nonunion building contractor, Respondents' Agent O'Day told Kroger's Real Estate Manager Killeen, that in order to have the picket line removed, the Council wanted an "understanding," "which could be in letter form" that Kroger would "require [its] landlords to use union labor in the construction of [its] stores

not to work at the picketed premises, induced and encouraged individuals employed by persons engaged in commerce and in an industry affecting commerce to refuse to perform services, and threatened, coerced, and restrained persons engaged in commerce and in an industry affecting commerce, and thereby engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.³⁹

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents set forth in section III, above, occurring in connection with the operations of the Employers 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 Respondents have engaged in certain unfair labor practices, the Trial Examiner will recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel suggests in his brief that because "the Respondents have demonstrated a proclivity to engage in unlawful secondary activity in furtherance of their dispute with other primary employers," a broad order, applicable to other such primary employers, in addition to Snyder, is appropriate. The record in this case does not "demonstrate" any such "proclivity." It does, however, disclose the Respondents' intention to engage in unlawful conduct in furtherance of their primary objective of forcing or requiring Kroger to cease doing business with nonunion contractors and with owners of property who use nonunion contractors to build stores for Kroger. An order, tailored to meet this unlawful objective, will be recommended.

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

CONCLUSIONS OF LAW

1. The Respondents, Council, Electrical Workers, Sheet Metal Workers, Carpenters, and Laborers, are labor organizations within the meaning of Section 2(5) of the Act.

2. By inducing or encouraging individuals employed by persons engaged in commerce or in an industry affecting commerce to engage in refusals in the course of their employment to perform services, and by threatening, coercing, or restraining persons engaged in commerce or in an industry affecting commerce, with the object of (1) forcing or requiring Ace, Bright, and Service Products to cease doing business with Kroger; (2) forcing or requiring Kroger to cease doing business with Schottenstein, and thereby to force or require the latter to cease doing business with Snyder; and (3) forcing or requiring Kroger to enter into an agreement to cease doing business, directly or indirectly, with Snyder or any other nonunion construction contractor, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i), (ii)(A) and (B) and Section 2(6) and (7) of the Act.

3. The evidence is insufficient to establish that by refusing to refer employees to Kroger, the Respondents threatened, coerced, or restrained that Company within the meaning of Section 8(b)(4)(ii)(A) or (B) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the Trial Examiner recommends that the Respondents, Columbus Building and Construction Trades Council, AFL-CIO; Local Union No. 683, International Brotherhood of Electrical Workers, AFL-CIO; Local Union #98, Sheet Metal Workers International Association, AFL-CIO; Local Union #200, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Local #423, International Hod Carriers', Building and Common Laborers' Union of America, AFL-CIO, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Inducing or encouraging individuals employed by The Kroger Co., Ace Sign Erection and Service Corp., Earl E. Bright, Inc., Service Products, Inc., or by any

³⁹ *Construction, Production & Maintenance Laborers Union Local 383, AFL-CIO, et al. (Colson and Stevens Construction Co., Inc.)*, 137 NLRB 1650.

other person engaged in commerce or in any industry affecting commerce, to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is, either to force or require Ace Sign Erection and Service Corp., Earl E. Bright, Inc., Service Products, Inc., or any other person to cease doing business with The Kroger Co.; to force or require The Kroger Co. to cease doing business with Schottenstein Co. or any other owner of property, or with the Charles R. Snyder Construction Co. or any other contractor; or to force or require The Kroger Co. to enter into an agreement which is prohibited by Section 8(e) of the Act

(b) Threatening, coercing, or restraining The Kroger Co., Ace Sign Erection and Service Corp., Earl E. Bright, Inc., Service Products, Inc., or any other person engaged in commerce or in an industry affecting commerce, for any of the objects set forth in paragraph 1(a) of this Recommended Order.

2. Take the following affirmative action which the Trial Examiner finds necessary to effectuate the policies of the Act:

(a) Post at their business offices, meeting halls, and all other places where notices to members are customarily posted, copies of the attached notice marked "Appendix."⁴⁰ Copies of said notice, to be furnished by the Regional Director for Region 9, shall, after being duly signed by representatives of the Respondents, be posted by the Respondents immediately upon receipt thereof, and be maintained by them for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for Region 9, signed copies of said notice for posting by The Kroger Co., Ace Sign Erection and Service Corp., Earl E. Bright, Inc., and Service Products, Inc., if willing, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, shall, after being signed by the Respondents, be forthwith returned to the Regional Director for disposition by him.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of the receipt of this Decision and Recommended Order, what steps they have taken to comply herewith.⁴¹

The Trial Examiner further recommends that the complaint, insofar as it alleges that the Respondents' refusal to refer employees to The Kroger Co. is an unfair labor practice within the meaning of Section 8(b)(4)(ii)(A) and (B) of the Act, be dismissed.

⁴⁰ In the event that this Recommended Order be 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 further event that the Board's Order be 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"

⁴¹ In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondents have taken to comply herewith"

APPENDIX

NOTICE TO ALL MEMBERS AND 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 Labor Management Relations Act, we hereby give notice that:

WE WILL NOT induce or encourage individuals employed by The Kroger Co., Ace Sign Erection and Service Corp., Earl E. Bright, Inc., Service Products, Inc., or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike, or a refusal to perform any services, where an object thereof is either to force or require any of the aforesaid or other employers to cease doing business with The Kroger Co., to force or require The Kroger Co. to cease doing business with Schottenstein Co. or any other owner of property, or with Charles R. Snyder Construction Co. or any other contractor, or to force or require The Kroger Co. to enter into an agreement which is prohibited by Section 8(e) of the Act.

WE WILL NOT threaten, coerce, or restrain The Kroger Co., Ace Sign Erection and Service Corp., Earl E. Bright, Inc., Service Products, Inc., or any other person engaged in commerce or in an industry affecting commerce for any of the objects set forth in the preceding paragraph.

COLUMBUS BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO,
Labor Organization.

Dated----- By-----
(Representative) (Title)

LOCAL UNION No. 683, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO,
Labor Organization.

Dated----- By-----
(Representative) (Title)

LOCAL UNION #98, SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION, AFL-CIO,
Labor Organization.

Dated----- By-----
(Representative) (Title)

LOCAL UNION #200, UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO,
Labor Organization.

Dated----- By-----
(Representative) (Title)

LOCAL #423, INTERNATIONAL HOD CARRIERS', BUILDING AND
COMMON LABORERS' UNION OF AMERICA, AFL-CIO,
Labor Organization.

Dated----- By-----
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees or members may communicate directly with the Board's Regional Office, Transit Building, Fourth and Vine Streets, Cincinnati, Ohio, Telephone No. 381-1420, if they have any questions concerning this notice or compliance with its provisions.

Elliott-Williams Co., Inc. and Sheet Metal Workers' International Association, Local 503, AFL-CIO. *Case No. 25-CA-1795.*
November 30, 1964

DECISION AND ORDER

On March 31, 1964, Trial Examiner Joseph I. Nachman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof. The General Counsel filed a brief in support of the Trial Examiner's Decision.