In the Matter of FIRESTONE TIRE AND RUBBER COMPANY *and* GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 90 OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, A. F. OF L.

Case No. 18–C–1039.—Decided September 29, 1944

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon an amended charge duly filed on May 12, 1944, by General Drivers, Warehousemen and Helpers, Local Union No. 90 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, A. F. of L., herein called the Union, the National Labor Relations Board, herein called the Board, by the Acting Regional Director for the Eighteenth Region (Minneapolis, Minnesota), issued its complaint dated July 1, 1944, against Firestone Tire and Rubber Company of Akron, Ohio, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce at its Des Moines, Iowa, plant, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and notice of hearing were duly served upon the respondent and the Union. Thereafter the respondent filed an answer dated August 1, 1944, in which it denied that it had engaged in the unfair labor practices alleged and prayed that the complaint be dismissed.

Pursuant to notice a hearing was held before a duly designated Trial Examiner of the Board on August 8, 9, and 10, 1944. The Board, the respondent, and the Union participated in the hearing. On or about September 5, 1944, counsel for the Board filed with the Chief Trial Examiner a motion to disqualify the Trial Examiner and to transfer the case to the Board for the issuance of proposed findings of fact, proposed conclusions of law, and proposed order because of alleged prejudicial errors committed by the Trial Examiner during the course of the hearing. Upon receipt of this motion the Chief Trial Examiner afforded all parties an opportunity to respond to said mo-

tion; counsel for respondent filed a comment on the motion. The motion was thereupon referred to the Board by the Chief Trial Examiner.

From the record it appears that during the course of the hearing the Trial Examiner read a credit rating report received by the respondent and relied upon by it as a defense to the allegation in the complaint that it had discriminated with respect to the hire and tenure of employment of one Harry Mayse. Throughout the hearing the respondent consistently declined to offer the document in evidence on the ground that to do so might render it subject to a libel suit. After considerable discussion the Trial Examiner suggested that the document be shown to him. This request was complied with by the respondent and the Trial Examiner, after reading the report, made comment on the record concerning the contents of the document. In our opinion, the action of the Trial Examiner was improper. Since the respondent did not desire to introduce the document in evidence, the Trial Examiner should not have suggested that the document be submitted to him for his personal inspection; he should not have examined it, nor, after having seen it, should he have made any comments on the record concerning the contents thereof. It is well established that, in administrative hearings such as the present one, "Nothing can be treated as evidence which is not introduced as such." (*Morgan* v. *United States*, 298 U. S. 468, 480.) We do not believe, however, that the Act would be best effectuated by considering the present record and issuing proposed findings of fact, conclusions of law, and a proposed order. In our opinion, a new hearing is advisable, for the reason, among others, that the respondent may have the opportunity, if it desires, to present its defense in proper manner subject to cross-examination. On the present state of the record, the respondent may have been led to believe that the Board would consider the Trial Examiner's statement based upon matters not in evidence. Accordingly, we shall order that the record made at the hearing of August 8, 9, and 10, 1944, with the exception of the charges and pleadings, be set aside and that a new hearing before another Trial Examiner be had upon appropriate notice from the Regional Director for the Eighteenth Region.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, and Article II, Section 37, of National Labor Relations Board Rules and Regulations—Series 3, as amended,

IT IS HEREBY ORDERED that the record in the above case, with the exception of the charges and pleadings, be, and it hereby is, set aside; and

IT IS FURTHER ORDERED that the proceeding be, and it hereby is, referred to the Regional Director of the Eighteenth Region for the purpose of a new hearing.