

In the Matter of OLD COLONY BOX COMPANY *and* UNITED PAPER-
WORKERS OF AMERICA—CIO

Case No. 5-C-2166.—Decided February 28, 1949

RULING

AND

ORDER

A charge in the above-entitled case was filed on August 14, 1946. The complaint, alleging that the Respondent had violated Section 8 (1) and 8 (3) of the Act, was issued on July 12, 1948. Copies of the complaint, the charge, and notice of hearing were served upon the Respondent and United Paperworkers of America, CIO, on July 12, 1948.

Thereafter, a hearing was held from August 3 to August 6, 1948, inclusive, before Trial Examiner John Lewis. At the hearing, the Respondent moved to dismiss the complaint on the ground that it was issued contrary to the limitation of Section 10 (b) of the amended Act. In opposition to this motion the General Counsel argued: (1) that Section 10 (b) is not applicable to cases in which a charge had been filed before August 22, 1947, the effective date of the amended Act; and (2) that the Respondent was actually put on notice of the specific nature of the charges against it on August 26, 1946, by a letter from the Regional Director for the Fifth Region. The Trial Examiner reserved ruling on the motion.

On October 12, 1948, without otherwise considering the merits of the case, the Trial Examiner in an "Order Dismissing Complaint" granted the Respondent's motion to dismiss, finding that there had been a failure to comply with the service requirements of Section 10 (b) in that the record contained no evidence of service of a copy of the charge upon the Respondent before or within 6 months after August 22, 1947, the effective date of the amended Act. He held that Section 10 (b) applied prospectively to cases in which the charge was filed before and the complaint was issued after the amendments to the Act became effective. The General Counsel thereupon filed with the Trial Examiner on October 18, 1948, a "Motion to Reopen

Record and Introduce Further Evidence," alleging that on June 30, 1947, the Regional Director for the Fifth Region, by registered mail, had served upon the Respondent a copy of the charge and that the return receipt, dated July 1, 1947, had been received by that office. At the same time, the General Counsel appealed to the Board from the Trial Examiner's ruling and moved the Board to direct the Trial Examiner to reopen the record for the purpose of receiving the above evidence of service. By Order, dated October 29, 1948, the Trial Examiner denied the motion of the General Counsel to reopen the record, holding that the evidence of timely service was available to the General Counsel and could have been introduced at the time of the hearing. The Trial Examiner held that the General Counsel's mistake as to the applicable law did not warrant the reopening of the record to introduce evidence of such service. Subsequently, on November 12, 1948, the General Counsel, without explanation, filed with the Board a withdrawal of his appeal and motion to reopen the record.

The Board has duly considered the matter, including the Trial Examiner's "Order Dismissing Complaint," his further order denying the General Counsel's motion to reopen the record, the General Counsel's appeal from the Trial Examiner's ruling, the General Counsel's motion to reopen the record and adduce further testimony, and his requested withdrawal of the appeal. Inasmuch as we are of the opinion that the policies of the Act would best be effectuated by a determination of this appeal on its merits, we hereby deny permission to the General Counsel to withdraw his appeal and motion to reopen the record.

RULING ON MOTION

We turn now to consideration of the General Counsel's motion to reopen the record.

Section 10 (b) of the amended Act provides:

. . . no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

The Board has held in a number of cases that the limiting language of this section should not be given retroactive effect.¹ The complaints in those cases, however, were issued before or within 6 months after August 22, 1947, the effective date of the amended Act. Filing and

¹ *Matter of Detroit Gasket and Manufacturing Company*, 78 N. L. R. B. 670, *Matter of Barton Brass Works*, 78 N. L. R. B. 431; *Matter of Bewley Mills*, 77 N. L. R. B. 774; *Matter of Briggs Manufacturing Company*, 75 N. L. R. B. 569; *Matter of Union Products Company*, 75 N. L. R. B. 591.

service of copies of the charges were accomplished within that period. In several cases, where the complaints were issued more than 6 months after August 22, 1947, the Board has held that Section 10 (b) imposes no limitation upon the issuance of complaints based on charges filed and served within 6 months of that date.² Recently, the question of *service* apart from the *filing* of the charges was specifically presented to the Board in a case where the charges were filed before August 22, 1947, but certain individual respondents were not served with copies of the charges until the complaint was issued on August 31, 1948. In that case, applying the converse of its previous interpretation of the limitations contained in Section 10 (b), the Board affirmed the Trial Examiner's ruling dismissing the complaint as to those respondents.³ Stated somewhat more broadly, these rulings mean that in all cases involving a complaint issued after August 22, 1947, based upon a charge alleging the commission of unfair labor practices before that date, the Board requires that the charge must have been filed and a copy thereof actually served upon the party against whom it was made within 6 months after the effective date of the amended Act.

In view of the General Counsel's failure at the hearing to prove actual service within this period, the Trial Examiner's ruling of October 12, 1948, was proper when made. Subsequently, however, on October 18, 1948, the General Counsel, in his motion to reopen the record and adduce further evidence, alleged that the Respondent, *in fact*, was served with a copy of the charge on June 30, 1947, prior to the effective date of the amended Act and well within the requirement of Section 10 (b) of the Act, as amended. The question therefore presented to the Board at this time pertains particularly to *proof* of service of a copy of the charge rather than to the question of *service itself*. Presumably, evidence of actual service was not introduced at the hearing because the General Counsel interpreted Section 10 (b) as inapplicable to this case. As indicated above, this interpretation was erroneous. We are of the opinion that where, as here, the alleged unfair labor practices occurred before August 22, 1947, the complaint having issued after that date, and the Respondent contends at the hearing that it did not receive a copy of the charge until more than 6 months had elapsed from that date, evidence of such service is a proper part of the record. We shall henceforth require, as a matter of Board procedure, that acceptable evidence of timely service of a

² *Matter of Itasca Cotton Manufacturing Company*, 79 N. L. R. B. 1442; *Matter of Electric Auto-Lite Company*, 80 N. L. R. B. 1601, *Matter of Olm Industries, Inc., Winchester Repeating Arms Company Division*, Case No. 1-C-3107, Order dated June 1, 1948.

³ *Matter of California Metal Trades Association*, Cases Nos. 20-C-1721 *et seq* Order dated November 3, 1948.

copy of the charge be introduced into the record at the hearing. This requirement extends to all future cases in which hearings have begun and have not yet been closed as of the date of this Ruling and Order.

The Trial Examiner, relying upon the general rule that a case will not be reopened after the hearing is closed unless it appears that the evidence was not available at the time of the hearing or unless some other sufficient explanation is given for the failure to introduce such evidence,⁴ denied the General Counsel's motion to reopen the record. At the time of the hearing, however, the effect of Section 10 (b), although discussed in several decisions, was still a question which had not been thoroughly explored. The Board had not yet specifically ruled on the effect of the filing of a charge before August 22, 1947, or on the question of service apart from the filing of such charge. Moreover, the Board has customarily applied a liberal rule of construction to the procedural requirement of proof of service.⁵ Under these circumstances, we are of the opinion that the General Counsel should be given an opportunity to introduce into the record the evidence of timely service to which he refers in his motion. We shall therefore grant the General Counsel's motion to reopen the record for the limited purpose of introducing evidence of timely service of a copy of the charge upon the Respondent within the meaning of this opinion.

ORDER

IT IS HEREBY ORDERED that the above-entitled case be, and it hereby is, remanded to the Trial Examiner, and

IT IS FURTHER ORDERED that the Trial Examiner be, and he hereby is, directed to reopen the record for the limited purpose of receiving the aforesaid evidence of service and, upon the introduction of such evidence in the record, to prepare and issue an Intermediate Report, consistent with our ruling herein.

⁴ *Matter of Basic Vegetable Products, Inc*, 75 N. L. R. B. 815; *Matter of Vogue-Wright Studios, Inc*, 76 N. L. R. B. 111; *Matter of Wyman-Gordon Company*, 62 N. L. R. B. 561.

⁵ Section 203.85 of the Board's Rules and Regulations provides: ". . . Failure to make proof of service does not affect the validity of the service." See, also, to the same effect, Rule 4 (g), *Rules of Civil Procedure for the District Courts of the U. S.*, and see Rule 4 (h), *ibid*, authorizing amendments to proof of service at any time upon equitable grounds.