In the Matter of WALTER J. MENTZER AND GEORGE E. WOCHLEY, AN INDIVIDUAL *and* OPERATIVE PLASTERERS' AND CEMENT FINISHERS INTERNATIONAL ASSOCIATION OF THE U. S. & CANADA, LOCAL NO. 31, A. F. L., PARTY TO THE CONTRACT

In the Matter of OPERATIVE PLASTERERS' AND CEMENT FINISHERS INTERNATIONAL ASSOCIATION OF THE U. S. & CANADA, LOCAL NO. 31, A. F. L., *and* GEORGE E. WOCHLEY, AN INDIVIDUAL *and* WALTER J. MENTZER, PARTY TO THE CONTRACT

Cases Nos. 6-CA-47 and 6-CB-2, respectively.—Decided March 24, 1949

DECISION

AND

ORDER

On June 4, 1948, Trial Examiner Horace A. Ruckel issued his Intermediate Report in the above-entitled matter, finding that the evidence appearing in the record was not sufficient to afford a basis for determining whether or not the operations of Respondent Mentzer affect commerce, within the meaning of the Act. He recommended that the complaint be dismissed, for reasons set forth in the copy of the Intermediate Report attached hereto. The complaint alleged that the discharge of a single employee constituted a violation of Section 8 (a) (3) and 8 (b) (2) of the Act, having been made pursuant to an invalid closed-shop agreement. Thereafter, on July 6, 1948, the General Counsel filed a motion to reopen the record for the purpose of adducing additional evidence with respect to Respondent Mentzer's business. Answers to the General Counsel's motion were filed by the Respondent Union and Mentzer. On July 29, 1948, the Board issued an order denying the motion, without prejudice to the right of the General Counsel to request reconsideration upon the filing and service of a detailed offer of proof. Thereafter, the General Counsel filed a motion to reconsider, together with an offer of proof, set forth below. Both Respondents filed answers opposing the motion.

The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the General Counsel's offer of proof, the Respondents'

answers thereto, and the entire record in the case,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications.[2]

Respondent Mentzer is engaged in the plasterer contracting business in the vicinity of Pittsburgh, Pennsylvania. During 1947, Mentzer employed an average of two or three employees. All plastering done by him is within the Commonwealth of Pennsylvania. His largest contract was for a plastering job on a new apartment building in Pittsburgh, for which he employed a total of six employees. Mentzer's office is at his home; his wife does the bookkeeping, as well as her household duties. His gross income for 1947 amounted to $33,000. During this period, he purchased raw materials valued at only about $11,000 from McCrady-Rogers Company, herein called McCrady, a Pittsburgh dealer in building supplies.

To supplement the foregoing evidence relating to commerce, which now appears in the record, the General Counsel has made a detailed offer of proof, summarized as follows: (1) Respondent Mentzer's purchases from McCrady during 1947 amounted to $11,585, of which amount $10,675 worth of material was shipped to McCrady from points outside the Commonwealth of Pennsylvania; and of the materials originating outside the Commonwealth, $4,426 worth was used by Mentzer on the apartment house project; (2) McCrady's own annual purchases amounted to $3,612,000, of which $2,600,000 originated from outside the Commonwealth; (3) McCrady's annual sales of plastering materials to contractors in the Pittsburgh area amounted to $240,000; (4) 90 percent of the plastering contractors who made purchases from McCrady bought less than $15,000 worth of materials in 1947; (5) total cost of the aforementioned apartment house project is $176,364; total number of employees on this project, 82; total value of materials to be used on the construction, $84,989, of which $59,817 worth originated from outside the Commonwealth; (6) in the construction industry, 87.2 percent of the total number of individual contractors in the industry did less than $25,000 worth of business in 1939; and in 1939, of the 6,589 contractors engaged in plastering and lathing in the United States, 89.2 percent did less than $25,000 worth of business;[3] and (7) the employment of non-union employees by one

[1] On July 2, 1948, the Board granted the General Counsel's request to extend the time for requesting oral argument until July 12, 1948; and to extend the time for filing exceptions and brief until July 26, 1948. No request for oral argument has been made; and no exceptions and brief have been filed. We have considered the motions, answers, and offer of proof as being in the nature of exceptions and briefs.

[2] The General Counsel's motion for reconsideration of the Board's Order of July 29, 1948, is accordingly denied.

[3] No offer was made to show, however, what proportion of the total amount of construction or plastering work done in the United States is performed by the many contractors whose annual business is less than $25,000.

contractor involved in a labor dispute on a construction project can shut down the complete project. In addition to the above, the General Counsel offered to present economic data to show the interstate nature of the construction industry in general.

The main argument of the General Counsel appears to be that the foregoing factors establish the importance of the small establishment in the construction industry, and indicate that effective control of unfair labor practices in the industry requires that even so small an establishment as that of Respondent Mentzer be brought within the scope of the Act. For the purpose of determining the issue raised, the offer of proof by the General Counsel is accepted as true and regarded as part of the record herein.

The question before us is one of discretion, not of power. Accepting the General Counsel's offer as proved, we nevertheless find that the operations of Respondent Mentzer, a small contractor, are essentially local in character, and that their interruption by a labor dispute could, at most, have only very remote and insubstantial effect on commerce. Nor does Mentzer's status as a building contractor dictate a different conclusion. In a number of recent cases involving aspects of the building-construction industry, the Board has refrained, we think wisely, from applying the Federal power to small and strictly local enterprises, without necessarily concurring in the contention that jurisdiction was utterly lacking under the commerce clause of the Constitution.[4] Members Houston and Murdock, although aware of the majority opinion in the *Watson* case,[5] view this Employer's operations as more remote in their effect on commerce than those in the *Watson* matter. Consequently, they believe that the instant case is not controlled by that decision.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint issued herein be, and it hereby is, dismissed.

MEMBER GRAY took no part in the consideration of the above Decision and Order.

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[4] See, e. g., *Matter of Richter Transfer Company*, 80 N. L. R. B. 1246; *Matter of Texas Construction Material Company*, 80 N. L. R. B. 1248; *Matter of Harvey M. Hanawalt, d/b/a Hanawalt Bros.*, 80 N. L R B. 1302; *Matter of Pacific Slope Lumber Company* 80 N. L. R. B. 1310. *Member Houston* is not persuaded by anything in the legislative history of the Act that the Board should assert its jurisdiction in one case and refuse to assert it in another merely because the case comes to us under different provisions of the Act.

[5] *Matter of Ira A. Watson Company*, 80 N. L. R. B. 533.

CHAIRMAN HERZOG, concurring:

This building construction operation is both local and insubstantial. Although its local attributes seem to me no more conspicuous than those present in the *Watson* case, where we exercised jurisdiction, a different result is permissible and warranted here because the section of the Act involved has a different legislative history.[6] Here we have discretion to decline to assert jurisdiction; there we unfortunately had none. As was indicated in my concurring opinion in that earlier case, as supported by its footnote 7 citing the legislative history of Section 8 (b) (4), it was there apparent that Congress intended the Board to exercise the *full* constitutional power of the Federal Government to prevent secondary boycotts. Therefore, despite unwillingness to intervene in "so local and so diminutive a controversy," I agreed that the Board had no choice but to proceed with the *Watson* case once we found enough commerce factors present to cause the Federal power to attach.

Here, however, there is no such compulsion present. These alleged unfair labor practices are of a different character. My reply to Mr. Reynolds' dissent simply is that Congress provided us with no parallel legislative history with respect to these practices. It follows that the Board is as free here as it was under the Wagner Act, and as all agree it has been in representation cases since the amendments, to exercise discretion to take or to decline to take jurisdiction.[7] It is exercising that discretion wisely, in my opinion, by declining to do so. Possible remote repercussions upon commerce are insufficient to justify our intervening in a controversy which the Commonwealth of Pennsylvania is competent to handle, unless we are to blind ourselves entirely to considerations of degree. As Justice Cardozo observed,

> Motion at the outer rim is communicated perceptibly though minutely, to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size." * * * The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions.[8]

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[6] *Matter of Ira A. Watson Company,* 80 N. L. R. B. 533 (November 1948), in which Members Reynolds, Murdock, and Gray all voted to assume jurisdiction, Member Houston dissenting. The difference in result here seems to me to call for explication.

[7] Nor does the General Counsel expressly contend here, as he does in several pending cases, that the Board lacks authority to decline to exercise jurisdiction once he has decided to issue a complaint. He merely argues that we should take jurisdiction on these facts.

[8] Cardozo, J. concurring in *Schechter* v. *U. S.,* 295 U. S. 495, 554. The issue there, of course, was different, but the imagery is equally apt here.

MEMBER REYNOLDS, dissenting:

In order to be consistent and afford guidance to parties who seek protection under the Act, I am compelled to subscribe to the principle that once the Board has elected to assume jurisdiction over a given industry, it has chosen a path which generally should be followed, absent a *de minimus* flow of material in commerce. The employer herein is directly engaged in the building and construction industry, over which the Board has previously asserted jurisdiction.[9] Unlike Members Houston and Murdock, I do not believe that the Employer's operations in the present case are "more remote in their effect on commerce than in the *Watson* matter," where we asserted jurisdiction. On this point, Chairman Herzog, the third member of the majority, and myself are in agreement, but he would nevertheless decline to proceed herein because this case, unlike the *Watson* case, does not involve a secondary boycott in violation of Section 8 (b) (4) (A) of the Act. However, I see no warrant for thus utilizing the type of unfair labor practices involved in a particular case as a basis for the exercise of discretion in determining whether the Board should assert jurisdiction. Indeed, the inequity of such approach is obvious—if the employer commits an unfair labor practice, the employees are left without redress; whereas, if the union violates Section 8 (b) (4) (A) of the Act, the employer is afforded plenary relief. Such uneven-handed justice clearly could not have been contemplated by the Congress in enacting the present statute. I would therefore assert jurisdiction in this case.

INTERMEDIATE REPORT

Mr. W. G. Stuart Sherman, for the General Counsel.
Mr. Joseph M. Gelman, of Pittsburgh, Pa., for respondent Mentzer.
Mr. Dennis J. Mulvihill, of Pittsburgh, Pa., for the respondent Union.

STATEMENT OF THE CASE

Upon charges filed in the above entitled cases on April 27, 1947, by George E. Wochley, an individual, and pursuant to an order dated April 28, 1948, of the Regional Director for the National Labor Relations Board, herein called the Board, consolidating the two cases, the General Counsel of the Board, herein called the General Counsel,[1] by the Regional Director for the Sixth Region (Pittsburgh, Pennsylvania), issued his complaint dated April 28, 1948, against Walter J. Mentzer, herein called respondent Mentzer, and Operative Plasterers' and Cement Finishers International Association of the U. S. and Canada, Local No. 31, A. F. L., herein called respondent Union, alleging that the respondents had engaged in

[9] *Matter of J. H. Patterson Co.*, 79 N. L. R. B. 355. On occasions, over my dissents, the Board has taken contrary action. See *Matter of Richter Transfer Company*, 80 N. L. R. B. 1246; *Matter of Texas Construction Material Company*, 80 N. L. R. B. 1248; *Matter of Blue Diamond Corporation, et al.*, 81 N. L. R. B. 484.

[1] This designation includes, and has particular reference to, the agent of the General Counsel presenting the case.

and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3); Section 8 (b) (1) and (2); and Section 2 (6) and (7) of the National Labor Relations Act, as amended June 23, 1947, herein called the Act. Copies of the complaint, accompanied by notice of hearing, were duly served upon the parties.

With respect to the unfair labor practices, the complaint alleged, in substance, that (1) on or about September 22, 1947, respondent Mentzer entered into an oral collective bargaining agreement with respondent Union, wherein he granted recognition to respondent Union as exclusive bargaining agent of his employees, agreeing with it that he would require his employees to join or remain members of respondent Union as a condition of employment, without an election being held pursuant to Section 9 (c) of the Act; and that (2) pursuant to this agreement, said to be invalid under the Act, respondent Union demanded, and respondent Mentzer effectuated, Wochley's discharge.

On May 7, 1948, respondent Union, and on May 10 respondent Mentzer, filed answers admitting certain allegations of the complaint but denying that they had engaged in any unfair labor practices. On May 11, respondent Mentzer filed an amended answer.

Pursuant to notice, a hearing was held on May 13, 14, and 15, 1948, at Pittsburgh, Pennsylvania, before Horace A Ruckel, the undersigned Trial Examiner, duly appointed by the Chief Trial Examiner. The General Counsel, respondent Mentzer, and respondent Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the conclusion of the General Counsel's case, the respondents moved to dismiss the complaint. The Trial Examiner denied this motion. The motion was renewed at the conclusion of all the evidence, and ruling thereon was reserved. The motion is disposed of by the recommendation herein made.

At the conclusion of the hearing the parties argued orally before the Trial Examiner, but waived their right to file briefs.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. RESPONDENT UNION

Operative Plasterers' and Cement Finishers International Association of the U. S. and Canada, Local No. 31, A. F. L., is a labor organization admitting to membership journeymen plasterers in the Pittsburgh, Pennsylvania, area, some of whom are from time to time hired by respondent Mentzer.

II. THE BUSINESS OF RESPONDENT MENTZER

Respondent Mentzer is a journeyman plasterer by trade. In the early part of 1946, he went into business for himself as a plasterer contractor, with his operations confined to Allegheny County, Pennsylvania. During the greater part of 1947, his contracts were for small jobs and he employed, on the average, two or three plasterers as his sole employees. As a rule, respondent Mentzer works on the job himself. He belongs to the Union.

Respondent Mentzer's office is at his home, where he has a desk. His wife, in addition to her household duties, helps her husband keep his books. She is not on the pay roll.

During the latter part of September 1947, respondent Mentzer started work on what was, for him, a large contract. This was the plastering and lathing on a new apartment building at Richland Lane and Penn Avenue, Pittsburgh. The lath work he subcontracted, but the plastering he did himself. For this job he expanded his force of employees to six, which included two plasterers, two plasterers' helpers, one apprentice, and one truck driver.

It is not clear from the record how long work on this apartment building lasted, but when it was finished respondent Mentzer's working force contracted to its normal size. His gross income for the year 1947, amounted to slightly more than $33,000. After paying his employees and his taxes, and making other required deductions, he was left with a net income for the year of $3,300.

The above findings relating to the nature of respondent Mentzer's business are based upon the uncontradicted and credible testimony of respondent Mentzer himself.

It is obvious, of course, when considering whether respondent Mentzer's operations "affect commerce", that his outflow of commerce is nil. Nor do any of his plastering materials come to him directly across State lines. All of them, consisting mostly of lime, neat plaster, and sand, he purchases from McCrady-Rogers Company, dealers in builders' supplies in Pittsburgh.[2]

William Shannon, purchasing agent for McCrady-Rogers Company, the only other witness as to commerce, testified on direct examination that during the year 1947, respondent Mentzer purchased raw materials from that company in a total amount of $11,316, of which a little less than $10,000, McCrady-Rogers bought outside the State of Pennsylvania, most of it from the U. S. Gypsum Company at Oakfield, New York. On cross-examination, however, Shannon admitted that his testimony as to these figures was based upon his recollection of a memorandum drawn up by the assistant credit manager of McCrady-Rogers Company, under circumstances not clearly revealed by the record, but not, so far as it appears, under the witness' own supervision or at his express direction. He testified that he had made a note of the figures, which he copied from the memorandum, and that he had this note with him in the courtroom. He did not, however, refer to the note to refresh his recollection while testifying. Shannon's testimony as to respondent Mentzer's account was as follows:

By Mr. GELMAN:

Q. Whether (sic) you obtain your figure of $11,316.

A. I obtained it from our credit department who have the figures there monthly.

Q. I didn't see you testify from any memorandum, is that correct?

A. I haven't got the original memorandum with me, no, I haven't got that.

Q. Then, you have no memorandum with you at all this time?

A. Not for 1947.

Q. Then your testimony is based upon a recollection of a memorandum that was made previously, is that correct?

A. No, not a recollection. I have the memorandum with figures.

Q. Where is the memorandum?

A. I have got it on a piece of paper here.

Q. You have no specific memory of the volume of business that Mr. Mentzer did with your firm? You can not remember each particular item?

[2] That is, all but approximately 25 dollars worth of shovels, hoes, trowels, and hods, which the General Counsel was able to show were purchased from E. E. Saxman and Sons, another Pittsburgh firm.

A. No, no, that is impossible.
Q. You are repeating something you heard somebody else say?
A. You mean in my answers?
Q. Yes.
A. From my own knowledge.
Q. This figure of $11,316?
A. (Interposing) No, that was given to me.
Q. That is not of your own knowledge?
A. No, sir.
Q. That was given to you by somebody else?
A. Yes, sir.[3]

When asked as to the total of McCrady-Rogers Company's shipments from outside the State of Pennsylvania, the witness was unable to testify either as to their amount or as to the relation which they bore to shipments originating within the State.

Respondent Mentzer, recalled by the General Counsel, was able to substantiate the figure of $11,316, given by Shannon as the total approximate amount of his purchases of raw materials from McCrady-Rogers Company during 1947. He had no knowledge, however, of the source from which that company obtained them.

Conclusions

The testimony of respondent Mentzer and witness Shannon comprises all the evidence in the record on commerce. The undersigned does not find it sufficient to show that any of the materials which respondent Mentzer purchased in 1947 originated outside the State of Pennsylvania. Shannon's hearsay testimony is without probative value in this respect. So far as the total amount of the materials sold to respondent Mentzer by the McCrady-Rogers Company is concerned, the testimony of respondent Mentzer, without considering that of Shannon, may be accepted as sufficient for the finding that they amounted to slightly more than $11,000. But it throws no light on the question of interstate commerce.

Assuming for the sake of argument, however, that the record is sufficient to establish the figure of approximately $10,000, as the amount of the materials furnished respondent Mentzer by the McCrady-Rogers Company, which originated outside the State of Pennsylvania, the undersigned believes that the complaint should nevertheless be dismissed on other grounds.

The undersigned does not attempt to say, as a matter of law, whether respondent Mentzer's operations affect commerce within the meaning of the Act, except to observe that, if they do, then so do those of nearly every corner grocery and neighborhood bakery in the country. Nor does he attempt to say whether the maxim *de minimis non curat lex* applies here, except to express the opinion that if a line were ever to be drawn between the trivial and the substantial in commerce it would pass very near respondent Mentzer.

It is sufficient that the Board in *Hom-Ond Food Stores, Inc.*,[4] decided May 13, 1948, dismissed a petition in a representation case saying: "Although we question the correctness of the Employer's contention that its operations do not affect

[3] The witness stated that the books and records from which these figures were said to be taken were, so far as he knew, available. No effort was made, however, to produce them.

[4] Cases Nos. 16–R–2427; 16–RC–68, 77 N. L. R. B. 647.

commerce within the meaning of the Act,[5] we do not believe that it would effectuate the statute's policies to assert jurisdiction in these two cases. Here, unlike *Matter of Liddon White Truck Co., Inc.*,[6] in which a majority of the Board thought it wise to exercise jurisdiction, *none of the goods purchased by the Employer come to it directly across State lines, and none of its sales are made to out-of-State customers.*" [Emphasis supplied.]

As the majority of the Board said in the *Liddon White* case, situations which present an issue as to the local character of an employer's operations were, under the Wagner Act, approached on a case to case business, and it cited various instances where the Board refrained, in the exercise of its discretion from asserting jurisdiction.[7] The minority, in a dissenting opinion, described these cases as ones which presented "situations that had an essential local flavor," and thought that they ought to be controlling in deciding the *Liddon White* case.

The undersigned does not believe that it was the intent of Congress, because of its concern over jurisdictional disputes in the building trades, that jurisdiction should be asserted by the Board in each and every case which involves one of those trades even where, as here, there is no jurisdictional dispute. Moreover, there is a difference between asserting jurisdiction over an industry in general, and asserting it as to each and every employer in the industry regardless of his size and without respect to place and time, or the relation of his operations to those of other employers in the industry in a particular situation. Respondent Mentzer's business is much smaller than that of any employer as to whom the Board has asserted jurisdiction, either under the Wagner Act or the Taft-Hartley Act,[8] so far as diligent search by the undersigned has revealed. The effect of his business upon commerce is, at the best, remote and slight. The General Counsel made no attempt to show how, or to what extent, the commerce of McCrady-Rogers Company would be affected by a labor dispute respondent Mentzer's employees.[9] It is a reasonable inference that the two or three whom he regularly employed could go on strike without the business of McCrady-Rogers Company being affected in the slightest degree.

Nor is there any evidence to show how the business of respondent Mentzer was integrated, if it was, with that of other trades and crafts in the construction industry. The undersigned can readily understand that it required more than respondent Mentzer and his plasterers to erect the apartment building at Richland

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[5] The purchases made indirectly in the *Hom-Ond Food Stores* case were far larger than in the instant case. Hom-Ond Food Store, Inc., operates a chain of 13 retail grocery stores in San Antonio, Texas. It has no stores in other states. During 1947, the employer purchased goods for these stores valued at about $3,000,000, all of which were purchased from wholesalers and distributors located within Texas. The only goods not products of Texas were so-called "name-brands" which originated originally outside the State; approximately 25 percent of the purchases were of this class. During the same period the Employer sold merchandise valued at about $4,000,000, all of which was sold and delivered within the State.

[6] 76 N. L R B. 165.

[7] See. *Matter of S. & R. Baking Co., Inc.*, 65 N. L. R. B. 351; *Matter of Mason & Son Coal Co.*, 72 N. L. R. B. 195; *Matter of Cousins Tractor Company*, 72 N. L. R. B 857.

[8] Under the Wagner Act the Board, by authorizing and issuing a complaint, administratively asserted jurisdiction. Under the Taft-Hartley Act the General Counsel is the one who administratively asserts jurisdiction, and it is not until after a hearing is held and an Intermediate Report issued, that the Board is in a position to assert or decline jurisdiction judicially. Under these circumstances, it would seem to devolve upon the Trial Examiner to make recommendations concerning the assertion of jurisdiction when the matter is in issue, as here.

[9] In fact, as has been seen, no attempt was made to show even the extent of that commerce.

Lane and Penn Avenue; but in the absence of any evidence as to the size and cost of that project, the largest on which respondent Mentzer was engaged in 1947, the number of employees and crafts involved, and the origin of the building materials, it would be extending judicial knowledge beyond all bounds for the undersigned to conclude that those who took part in its construction, including respondent Mentzer, were engaged in commerce within the meaning of the Act.

RECOMMENDATIONS

For all the reasons indicated above, the undersigned recommends that the complaint herein be dismissed.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board, Series 5, effective August 22, 1947, any party may within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

HORACE A. RUCKEL,
Trial Examiner.

Dated June 4, 1948.