

In the Matter of FRED MONTGOMERY, DOING BUSINESS AS PEREIRA STUDIO
and PORTRAIT & COMMERCIAL PHOTOGRAPHERS & PHOTO FINISHERS
UNION, No. 24244, AFL

Case No. 21-CA-68.—Decided May 13, 1949

DECISION

AND

ORDER

On June 25, 1948, Trial Examiner Howard Myers issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that he cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by 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 exceptions and brief, and the entire record in the case, and finds merit in the Respondent's exceptions.

The jurisdictional facts are, in brief, as follows: The Respondent, an individual, is the owner of a small store in Tucson, Arizona, where he is engaged in the sale of cameras, photographic supplies, picture frames, and greeting cards, and the operation of a portrait studio and photo finishing service. He had three or four employees at the time of the hearing. During the year ending June 1, 1948, he purchased from outside the State of Arizona camera supplies valued at approximately \$19,000,¹ and greeting cards and picture frames, the exact value of which does not appear; all this merchandise was shipped to him from outside the State. During the same period, he purchased locally photographic finishing supplies valued at approximately \$1,500; most of these supplies originated outside the State. All sales were made, and services rendered, to customers within the State.

¹ This sum, not representative of his normal annual purchases, included the entire stock of the camera shop, a department opened during this period.

Upon these facts, the Trial Examiner found that the Respondent was engaged in commerce within the meaning of the Act; that his activities had a close, intimate, and substantial relation to commerce; and that his unfair labor practices tended to lead to labor disputes burdening and obstructing commerce. It is clear, however, that the Respondent's business is a small local enterprise, and that the interruption of his operations by a labor dispute could have only a remote and insubstantial effect on commerce. For the reasons given in *Matter of A-1 Photo Service*,² we hold that we have power to dismiss the complaint herein. We find, moreover, that the assertion of jurisdiction would not effectuate the policies of the Act. We shall, therefore, dismiss the complaint in its entirety.

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 against the Respondent, Fred Montgomery, doing business as Pereira Studio, Tucson, Arizona, be, and it hereby is, dismissed.

INTERMEDIATE REPORT

Mr. Philip Licari, for the General Counsel.

Mr. Richard H. Chambers, of Tucson, Ariz., and *Mr. Frank Ryley*, of Phoenix, Ariz., for the Respondent.

Mr. O. A. Dever, of Lowell, Ariz., for the Union.

STATEMENT OF THE CASE

Upon an amended charge duly filed by Portrait & Commercial Photographers & Photo-finishers Union, No. 24244, affiliated with the American Federation of Labor, herein called the Union, the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel and the Board, by the Regional Director for the Twenty-first Region (Los Angeles, California), issued his complaint against Fred Montgomery, doing business as Pereira Studio, herein called the Respondent, alleging that the said Respondent had engaged in, and is engaging in, unfair labor practices affecting commerce, within the meaning of Section 8 (a) (1), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, (Public Law 101 Chapter 120, 80th Congress, First Session), herein called the Act. Copies of the complaint and amended charge together with notice of hearing thereon, were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that (1) on or about October 15, 1947, and at all times thereafter, although duly requested to do so, the Respondent has refused to bargain collectively with respect

² 83 N. L. R. B. 564. See also *Matter of Sun Photo Company*, 78 N. L. R. B. 1249, in which we dismissed a petition for investigation and certification of representatives in a similar small business.

to his employees' wages, hours of employment, and conditions of employment with the Union as the exclusive representative of his employees in a certain appropriate unit, although a majority of his employees in the said unit had selected and designated the Union as their representative for such purpose; and (2) the Respondent has interfered with, restrained, and coerced his employees in the exercise of the rights guaranteed in the Act by (a) interrogating them with respect to their union affiliations and activities, (b) threatening to close his business establishment if they preferred to bargain collectively through the Union, (c) expressing preference to bargain individually with them rather than collectively through the Union, and (4) persuading them to withdraw from the Union.

The answer duly filed by the Respondent denied the commission of the alleged unfair labor practices. The answer averred that the Board did not have jurisdiction over the Respondent

Pursuant to notice, a hearing was held on June 2 and 3, 1948, at Tucson, Arizona, before Howard Myers, the Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented by counsel; the Union by a representative. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues was afforded all parties. At the close of the General Counsel's case-in-chief, the Respondent moved to dismiss the complaint in its entirety for lack of proof and on the further ground that the Board lacked jurisdiction. The motion was denied. At the conclusion of the taking of the evidence, the Respondent renewed his motion to dismiss. Decision thereon was reserved. The motion is, for the reasons hereinafter set forth, denied. General Counsel's motion to conform the pleadings to the proof with respect to minor inaccuracies was granted. The oral argument, which is part of the stenographic transcript of the hearing and in which the General Counsel and the Respondent participated, was then had. Although afforded an opportunity to file with the undersigned briefs and Findings of Fact and Conclusions of Law, none of the parties has done so.

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

FINDINGS OF FACT

1. THE BUSINESS OF THE RESPONDENT

Fred Montgomery owns and operates the Pereira Studio in Tucson, Arizona, where he is engaged in portrait photography, processing and finishing of photographic films, and in the sale of cameras, photographic supplies, picture frames and greeting cards. During the period from June 1, 1947, to June 1, 1948, Montgomery purchased cameras and camera accessories valued at \$19,350.77, all of which were shipped to his business establishment in Tucson from points located outside the State of Arizona. During the same period, he also purchased locally photographic finishing supplies valued at \$1,507.96. During the aforesaid period, from ten to twelve percent of Montgomery's gross sales, amounting to about forty or fifty thousand dollars, consisted of greeting cards and picture frames, all of which cards and frames were purchased by Montgomery, and shipped to him, from points located outside the State of Arizona. Montgomery does not ship directly any sales outside the State of Arizona.

Upon the above admitted facts, the Act is plainly applicable to the Respondent and the employees here involved. The test of the Act's application, laid down

by the Supreme Court in the *Jones & Laughlin*¹ case and repeatedly reaffirmed and applied by that Court in subsequent decisions,² is whether "stoppage of . . . operations by industrial strife" would or may result in interruption of or interference with the free flow of goods in interstate and foreign commerce. In receiving his purchases almost entirely from outside the State of Arizona, the Respondent is engaged in interstate commerce within the meaning of the Act.³ It is plain that a stoppage of the Respondent's operations would immediately and directly operate to stop or curtail the interstate movement of goods to the Respondent's plant. The jurisdictional test is thus completely satisfied, as the applicable decisions hold. The flow of commerce is the same flow, from whichever end it is viewed, and the protective power of the Congress does not vary by reason of the point from which the flow is viewed. As the Court pointed out in the *Newport News* case, *supra*:

There can be no difference in principle between the case in which manufacture precedes and that in which it follows interstate commerce. If the flow of commerce is obstructed by labor disputes it can make no difference from which direction the obstruction is applied.

The power of the Congress, moreover, extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate.⁴

Nor does the fact that the Respondent owns and operates a small establishment and employs but a few persons divest the Board of jurisdiction over him and his employees. The decision of the Supreme Court in *N. L. R. B. v. Fainblatt*, *supra*, is decisive upon this point. In that case the Act was held applicable to a small manufacturer of women's clothing whose total output was about a thousand dozen garments per month. Regarding this point the Court stated at page 604:

Nor do we think it important, as respondents seem to argue, that the volume of the commerce here involved, though substantial, was relatively small as compared with that in the cases arising under the National Labor Relations Act which have hitherto engaged our attention. The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small. *Hanley v. Kansas City Southern Ry. Co.*, *supra*. The exercise of Congressional power under the Sherman Act,

¹ 301 U. S. 1.

² *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453; *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197; *N. L. R. B. v. Fainblatt*, 306 U. S. 601; *N. L. R. B. v. Bradford Dyeing Ass'n.*, 310 U. S. 318.

³ *Washington, Virginia & Maryland Coach Co. v. N. L. R. B.*, 301 U. S. 142; *N. L. R. B. v. Norfolk Shipbuilding and Drydock Corp.*, 109 F. (2d) 128 (C. C. A. 4); *Southern Colorado Power Co. v. N. L. R. B.*, 111 F. (2d) 539 (C. C. A. 10); *Newport News Shipbuilding & Drydock Co. v. N. L. R. B.*, 308 U. S. 241; *N. L. R. B. v. Suburban Lumber Co.*, 121 F. (2d) 829 (C. C. A. 3), cert. den. 314 U. S. 693; *Brandeis & Sons v. N. L. R. B.*, 142 F. (2d) 977 (C. C. A. 8), cert. den. 323 U. S. 751; *N. L. R. B. v. Richter Bakery*, 140 F. (2d) 870 (C. C. A. 5), cert. den. 322 U. S. 754.

⁴ *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295. The Congress may regulate the activities of a local grain exchange shown to have an injurious effect on interstate commerce. *Chicago Board of Trade v. Olsen*, 262 U. S. 1. It may regulate intrastate rates of interstate carriers where the effect of the rates is to burden interstate commerce. *Houston, E. & W. Texas Ry. Co. v. United States*, 234 U. S. 342. It may compel the adoption of safety appliances on rolling stock moving intrastate because of the relation to and effect of such appliances upon interstate traffic moving over the same railroad. *Southern Ry. Co. v. United States*, 222 U. S. 20.

the Clayton Act, the Federal Trade Commission Act, or the National Motor Vehicle Theft Act, has never been thought to be constitutionally restricted because in any particular case the volume of the commerce affected may be small. The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication

II. THE ORGANIZATION INVOLVED

Portrait & Commercial Photographers & Photo Finishers Union, No. 24244, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Respondent.

III. THE UNFAIR LABOR PRACTICES

1. *Interference, restraint, and coercion.*

There is no evidence of any union activity among the employees of the Respondent prior to March 1947. Between March 15 and April 30 of that year, the six employees then in the Respondent's employ paid the stipulated initiation fees to the Union.

On October 15, 1947, 3 representatives of the Union called upon Montgomery and informed him that the Union represented a majority of his employees. They then asked him to recognize the Union as the exclusive collective bargaining representative of his employees and to bargain collectively with it as such representative. Montgomery testified, and the undersigned finds,⁵ that after the Union's representative explained to him the reason for their visit:

Mr. Durkin (a representative of the Union), I believe, informed me that there was no question of salaries, it was not a question of increasing the cost. I told him that I was under the impression, and I had had no complaints from the employees, they had always been treated good, their hours were good, they got a paid vacation each year, and I could see no need for the union to undertake to look after their affairs, especially since the cost of doing business was at its maximum at the present.

Mr. Durkin told me that he understood and had been told by my employees that they were very well satisfied with working conditions, with their salaries, and that it was not a question of salaries, they were not seeking to increase their salaries, but they would like for me to sign up with them so that they could hold the standards of competitive places up to my standards.

Montgomery further testified, and the undersigned further finds, that after the Union's representatives told him that if he would execute a collective bargaining contract the Union would send considerable business to him and that he replied that after he had executed a contract, the Union would then endeavor to induce his competitors to execute similar contracts and then he would be in no better position because the Union then would have to send business to those executing contracts. Toward the end of the conference, according to Montgomery's testimony, which testimony the undersigned credits, Durkin mentioned that maybe I could not afford to close up my photo finishing, that the business would

⁵ The testimony of Montgomery, quoted herein, is taken from his answers given in response to questions propounded to him by his counsel.

suffer too much, and I told him at that time that at least as far back as a year or more that I had contemplated discontinuing the photo finishing department due to the fact that the overhead was too high for the volume, and that I would be much better off not operating photo finishing and taking care of my camera shop and portrait and commercial work.

After the Union's representatives left the Respondent's studio, Montgomery informed John Gabusi, and his brother, Roy, of the union representatives visit and then asked them whether they belonged to the Union. Each replied in the affirmative. Montgomery then said to John Gabusi, in the presence of Roy, according to Montgomery's credited testimony :

I could not see and could not understand what the union could do for our business. In the first place, as far as I could see the only excuse for a union, from information that I had gained from the newspapers, that the idea of a union was to have a continual increase in salary, and that our salaries were at the maximum at the present time, and if the union did come in and increase salaries, it would make photo finishing prohibitive to me, because the salaries were at their maximum at present.

I also told him that he is entitled to affiliate himself with any union or any body of people that he cares to, but that I believed in my personal opinion that somebody had been exaggerating the profits of the photo finishing business and perhaps talked him into something, not realizing both sides of the story, and that I would like for him to take two or three days or until Saturday, those were my exact words, to think over the situation, then make up his mind; maybe he has been talked into something that was not—that was exaggerated, and that since he has heard my side of the story and that we are not making money on the photo finishing, how could we hope to increase salaries and still stay in business; and that he is at liberty any time to affiliate himself to any union, but on the other hand, I told him that I had some little prejudice, but since it was my place of business I preferred to do business with them separately and individually and not as a group through some outsider that has no connection with our business and, as far as I know, knows nothing about our particular type of business.

Montgomery admittedly then repeated substantially the same statements to his two other employees.

Roy Gabusi testified that during the above quoted conversation of October 15, Montgomery said that he "would like to know by Saturday [three days hence]—if we still belonged to the Union or not." John Gabusi testified that during the conversation of October 15, as quoted above, Montgomery said to him that he would give him until Saturday next to decide whether he would remain in the Union or not. The undersigned finds that Montgomery, in his conversations with John and Roy Gabusi made the additional statements, above referred to, attributed to him by the Gabusi brothers.

That evening or the next evening, Roy Gabusi attended a meeting of the Union. He was the one employee of the Respondent who attended. There were, however, other members present but they were employed in other establishments. At the meeting, Roy Gabusi announced his resignation from the Union.

The next day, according to Montgomery's credited testimony :

The four people that I had talked to, they all came to me, and they told me that they wanted to tell me that they believed they had been talked into something against their better judgment, and that since thinking the matter over and seeing both sides, they would rather stay with me and do their

bargaining individually as before, and they did not wish to affiliate themselves with any outside group of people.

Q. Did you again or not explain to them they had a right to belong to the union?

A. I told them at that time that I didn't want them to be influenced by anything that I said, but I did want them to understand these things, my side as well as the other side, and draw their own conclusions. They are perfectly at liberty to affiliate themselves with any union whatsoever, and I would prefer to do business with them individually.

On or about January 1, 1948, Montgomery received a notice from the Union that it intended to picket his place of business because he had refused to bargain collectively with it as the designated bargaining representative of his employees. Upon receipt of the notice, Montgomery called his employees together; told them the contents of the notice; asked them whether the Union still represented them; when they replied in the negative, Montgomery then prepared and had each employee sign a letter which, in effect, was a resignation from the Union; and then Montgomery forwarded the letter to the Union.

It is clear from the above recital of the facts that the Respondent was opposed to its employees joining the Union and forcibly brought that fact to their attention when he told them, in his conversation with them on October 15, 1947, among other things, that he would give each of them 3 days in which to decide whether to remain a union member or not. This statement was made in connection with his remark "if the union [come] in and increase salaries, it would make photo finishing prohibitive to me." Indicating that if the employees remained members of the Union, he would discontinue the photo finishing department, the one department in which he had employees. The other departments, Montgomery handled himself. That the employees so understood Montgomery is evidenced by his testimony that on October 16, the employees told him "they would rather stay with him and do their bargaining individually as before, and they did not wish to affiliate themselves with any outside group of people."

The Respondent's counsel concluded at the hearing that Montgomery's statements to his employees on October 15, 1947, are protected by Section 8 (c) of the Act. Insofar as presently relevant, that section provides that "The expressing of any views, arguments, or opinion . . . shall not . . . be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." The legislative history of the Act clearly indicates that the objective of Section 8 (c) was to preclude an inference of unfair conduct from an unconnected statement of attitude alone. It was not designed to preclude, as here, consideration of connected, immediately relevant utterances. Viewed in this light, the statements of Montgomery carried with them the threat of closing his establishment if the employees continued to insist upon having the Union bargain for them or if they remained members thereof. Hence, the requirements of Section 8 (c) is fully met.

Assuming, *arguendo*, that Montgomery's statements did not in themselves contain any such threat of reprisal or force or promise of benefit. That fact, standing alone, would not bring the statements within the purview of Section 8 (c) for, as the legislative history of the Act shows, that the Congress did not intend that the threats and promises of benefit which remove expressions of views and opinions from the protection of that section must necessarily appear in the context of such statement. It was not, moreover, the intention of the

Congress to preclude a consideration of threats or promises of benefit where, as here, they are implicitly and inextricably a part of the conduct in question.⁶

Accordingly, the undersigned finds upon the entire record in the case, that by making the anti-union statements and engaging in anti-union activities, as epitomized above, including the preparation and distribution of the letter of resignations, the Respondent has interfered with, restrained, and coerced his employees in the exercise of the rights guaranteed in Section 7 of the Act thereby violating Section 8 (a) (1) of the Act.

2. *The refusal to bargain collectively with the Union*

a. *The appropriate unit*

The complaint alleged that during all times material herein Respondent's employees, excluding supervisory employees as defined by the Act, constitute, and now constitute a unit appropriate for the purposes of collective bargaining. This evidence was introduced tending to show that the said unit was, or is, inappropriate. Under the circumstances, the undersigned finds that all the Respondent's employees, excluding all supervisory employees having the authority, in the interest of the Respondent, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment now constitute, and at all times material herein, did constitute, a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act. The undersigned further finds that the said unit insures to the said employees of the Respondent the full benefit of their right to self-organization and collective bargaining and otherwise effectuates the policies of the Act.

b. *Representation by the Union of a majority in the appropriate unit*

On and since October 15, 1947, the Respondent has had four persons in his employ. The General Counsel contended at the hearing that all of them should be included in the appropriate unit. The Respondent, on the other hand, contended that John Gabusi, and the person who replaced Gabusi when he resigned from the Respondent's employ in April of this year, should be excluded from the unit because Gabusi was, and his replacement is, a supervisory employee as defined in the Act. The evidence clearly shows that the Respondent's contention is correct and the undersigned so finds.

As found above all the employees were members of the Union on October 15, 1947, and that they so advised Montgomery on that date. The undersigned finds, contrary to the Respondent's contention, that the said employees, exclusive of John Gabusi, are still members of the Union. In support of his position, the Respondent points to the repudiation of the Union by the employees on October 16, 1947, and early in January 1948, as evidence that the Union no longer represents his employees. The Respondent cannot excuse his refusal to recognize or bargain with the Union on the basis of the alleged defection from the Union, even assuming that a number sufficient to destroy the majority status had re-

⁶ See 93 Cong. Rec. 4261, 3950, 6601, 6603, 6604-6605, 6673, 7002; Sen. Rep. No. 103, 80th Cong., 1st Sess., p. 23; House Rep. No. 510, 80th Cong., 1st Sess., pp. 43, 45; House Rep. No. 245, 80th Cong., 1st Sess., p. 33.

puddiated the Union on October 16, 1947, and in January 1948, since these defections were induced by the Respondent's unlawful conduct. It follows, therefore, that the Respondent's unfair labor practices cannot operate to destroy the exclusive representative status of the Union previously established by the untrammelled will of the majority of the employees in the appropriate unit.⁷

In view of the foregoing, and upon the entire record, the undersigned finds that on October 15, 1947, and at all times thereafter, the Union was, and still is, the exclusive representative of all the employees in the appropriate unit for the purposes of collective bargaining with respect to pay, hours of employment, and other conditions of employment.

c. The refusal to bargain collectively

It is evident from the above recital of the facts in this case that the Respondent on October 15, 1947, and at all times thereafter refused to bargain collectively with the Union as the exclusive bargaining representative of his employees. It would serve no useful purpose to set forth here at length the evidence, already summarized above. The summary shows its substance. The undersigned, accordingly, finds that on October 15, 1947, and at all times thereafter, the Respondent refused to bargain collectively with the Union as the exclusive representative of his employees in an appropriate unit, and has thereby interfered with, restrained, and coerced his employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the Respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and such of them as has been found to be unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violating Section 8 (a) (1) and (5) of the Act, the undersigned will recommend that he cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has refused to bargain collectively with the Union as the exclusive representative of his employees in an appropriate unit, the undersigned will recommend that the Respondent upon request, bargain collectively with the Union.

The scope of the Respondent's illegal conduct discloses a purpose to defeat self-organization among his employees. Shortly after the Respondent learned of the union activities of his employees he sought to coerce them in the exercise of the rights guaranteed them in the Act by refusing, among other things, to bargain collectively with the Union. Such conduct, which is specifically violative of Section 8 (a) (1) and (5) of the Act, reflects a determination generally to interfere with, restrain, and coerce his employees in the exercise of the right

⁷ See *Medo Photo Supply Corporation v. N. L. R. B.*, 321 U. S. 678; *N. L. R. B. v. Bradford Dyeing Ass'n*, 310 U. S. 318; *International Machinists v. N. L. R. B.*, 311 U. S. 72; Cf *Franks Bros. Co v. N. L. R. B.*, 321 U. S. 702 and *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350.

to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, and presents a ready and effective means of destroying self-organization among his employees. Because of the Respondent's unlawful conduct and since there appears to be an underlying attitude of opposition on the part of the Respondent to the purposes of the Act to protect the rights of employees generally, the undersigned is convinced that if the Respondent is not restrained from committing such conduct, the danger of their commission in the future is to be anticipated from the Respondent's conduct in the past, and the policies of the Act will thus be defeated. In order, therefore, to make effective the interdependent guarantees of Section 7 of the Act, to prevent a recurrence of unfair labor practices, and thereby minimize industrial strife which burdens and obstructs commerce, and thus effectuate the policies of the Act, the undersigned will recommend that the Respondent cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act.

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

CONCLUSIONS OF LAW

1. Portrait & Commercial Photographers & Photo Finishers Union, No. 24244, affiliated with the American Federation of Labor is a labor organization, within the meaning of Section 2 (5) of the Act.

2. All the Respondent's employees, exclusive of supervisory employees having the authority, in the interest of the Respondent, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such activity is not of a merely routine or clerical nature but requires the use of independent judgment constitute, and during all the times material did constitute, a unit appropriate for the purposes of collective bargaining, within the meaning of Section 8 (a) (5) of the Act.

3. The aforesaid Union was on October 15, 1947, and at times thereafter has been, and now is, the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on October 15, 1947, and at all times thereafter, to bargain collectively with the Union as the exclusive representative of all the employees in the appropriate unit, the Respondent has engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8 (a) (5) of the Act.

5. By interfering with, restraining, and coercing his employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8 (a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

On the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the Respondent, Fred Montgomery, doing business as Pereira Studio, Tucson, Arizona, his agents, successors, and assigns, shall :

1. Cease and desist from :

(a) Refusing to bargain collectively with the aforesaid Union as the exclusive representative of all the employees in the above described appropriate unit ;

(b) In any other manner interfering with, restraining, or coercing his employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act :

(a) Upon request bargain collectively with the Union as exclusive representative of all his employees in the above-described appropriate unit and if an understanding is reached, embody such understanding in a signed agreement ;

(b) Post in his studio in Tucson, Arizona, copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director of the Twenty-first Region, shall, after being duly signed by the Respondent, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material ;

(c) Notify the Regional Director for the Twenty-first Region (Los Angeles, California), in writing, within ten (10) days from the receipt of this Intermediate Report, of what steps the Respondent has taken to comply herewith.

It is further recommended that unless, on or before ten (10) days from the date of the receipt of this Intermediate Report, the Respondent notifies the said Regional Director in writing that he will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

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.

Dated at Washington, D. C. this 25th day of June, 1948.

HOWARD MEYERS,
Trial Examiner.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist PORTRAIT & COMMERCIAL PHOTOGRAPHERS & PHOTO FINISHERS UNION, No. 24244, affiliated with the American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this union, or any other labor organization.

WE WILL BARGAIN collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All our employees, exclusive of supervisory employees as defined by the aforesaid Act.

FRED MONTGOMERY,
DOING BUSINESS AS PEREIRA STUDIO,
Employer.

By _____

Dated _____

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