

nance employees constitute an appropriate unit, apart from other employees.⁴

Accordingly, we find that all maintenance employees at the Employer's New Bedford, Massachusetts, plant, including machinists and helpers, carpenters and helpers, electricians and helpers, pipe fitters and helpers, welders, millwrights, tinsmiths and helpers, firemen and oilers, pump room men, generator men, rack repairmen, painters, porters, janitors, laborers, tool crib attendants, and maintenance department general helpers, but excluding production employees, shipping room employees, receiving department employees, office and clerical employees, guards, watchmen, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

[Text of Direction of Election omitted from publication in this volume.]

⁴ Cf. *Armstrong Cork Company*, 80 NLRB 1328; *Jefferson Chemical Company*, 81 NLRB 1393; *W. F. Schrafft & Sons Corporation*, 86 NLRB 77; *E. I. DuPont de Nemours & Company*, 88 NLRB 941.

WILLIAM PENN BROADCASTING COMPANY *and* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL. *Case No. 4-CA-354. April 2, 1951*

Decision and Order

On August 21, 1950, Trial Examiner Hamilton Gardner 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 it 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.¹

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and brief, and the entire record in the case, and adopts the findings of fact of the Trial Examiner as modified below. We do not, however, adopt his conclusions.

¹ American Communications Association, herein called the ACA, as a party to a contract with the Respondent, was duly served with a copy of the complaint which specifically raised such contract in issue. However, the ACA failed to enter an appearance at the hearing. After the issuance of the Intermediate Report, the ACA filed with the Board "Motion to Intervene and For Other Relief" together with a proposed bill of exceptions to the Intermediate Report and a supporting brief. In view of our disposition of the case herein, we find it unnecessary to pass upon this motion.

The Trial Examiner in his Intermediate Report found a violation of Section 8 (a) (2) and (1) of the Act, to which the Respondent filed exceptions. Briefly stated, the pertinent facts are as follows: On December 13, 1949, the charging union, International Brotherhood of Electrical Workers, herein called the IBEW, filed with the Board a petition for certification as the bargaining representative of the Respondent's "broadcast technicians and engineers."² On February 3, 1950, while the petition was still pending, the Respondent *renewed* its contractual relations with the ACA, which had been representing for 12 years a unit of the Respondent's production employees that included the technicians sought in the petition.³ On the same date, wage increases provided for in the contract were put into effect.

The Trial Examiner adopted the theory relied upon in the complaint that the Respondent, by entering into an exclusive bargaining contract with the ACA in the face of the IBEW's pending petition before the Board, violated the Act under the *Midwest Piping* doctrine.⁴ He failed to pass upon the Respondent's contention, expressly advanced in its answer to the complaint, and reasserted in its exceptions to the Intermediate Report, that when it entered into the contract with the ACA, no valid question concerning representation existed because the unit sought by the IBEW in its petition was inappropriate. We find merit in this contention of the Respondent.

The construction placed upon the *Midwest Piping* doctrine by the Trial Examiner under the circumstances of this case, would, in our opinion, operate in derogation of the practice of continuous collective bargaining which the Act was designed to encourage in the interest of industrial stability. Moreover, such a broad application of the doctrine as here proposed by the Trial Examiner would serve only to deprive employees of the benefits of an uninterrupted bargaining relationship whenever a clearly unsupportable or specious rival union claim is made upon an employer. In conformity with these views, we conclude that the pendency of a petition for certification imposes no duty upon an employer to refrain from continuing exclusively to recognize and deal with an *incumbent* bargaining representative, such as we have here, unless the petition has a character and timeliness which create a real question concerning representation.⁵

² It appears that the classifications of technician and engineer are used interchangeably in the Respondent's operations.

³ No exceptions were filed to the finding of fact in the Intermediate Report as to the existence of such a 12-year bargaining history.

⁴ The doctrine derived its name from the case entitled *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (September 1945).

⁵ Necessarily, it is for the *Board*, within the prescribed procedures of the Act, ultimately to determine after full litigation of the issue, whether a real question concerning representation existed under particular circumstances. Member Houston misconstrues this fact in his dissent, in inaccurately describing our finding as a "rule of employer determination." The "determination" which an employer may make for himself, and at his peril, under the rule in this case is in no way different from the interpretations of law, derived from existing statutes and authoritative legal opinions, an employer is regularly called upon to make to guide himself in his other business activities.

The existence of such a question concerning representation is determinable by applying the same criteria, contemplated in Section 9 of the Act, that are uniformly applied by the Board in finding a "question of representation" before proceeding to an election. One of the essential elements for a determination that such a "question" exists is that the petitioning union, seeking to displace an incumbent, assert its claim as to *an appropriate unit of employees*.

Our dissenting colleague misconstrues our finding here. Clearly, we have applied what is *properly* the *Midwest Piping* doctrine⁶ to this case, which does involve "an incumbent union situation." Contrary to member Houston's view, our finding certainly effects no abatement or diminution of the employee's right under the Act to change their bargaining representative. Indeed, under the Act no opportunity is presented for a change from the incumbent representative of the employees unless a real "question of representation" exists within the meaning of Section 9 (c). In the absence of such a question, therefore, if the employer's contract with the incumbent union has any tendency to encourage the employees to become or remain members of the incumbent union, which Member Houston emphasizes as a point of objection, this is merely a possible and natural advantage which inheres in the position of every lawful bargaining agent and does not constitute an interference with the employees' free choice of representatives prescribed by the Act.

In the present case, as in all cases, the burden of establishing the facts to support the violation alleged in the complaint rests upon the General Counsel. Thus, it was incumbent upon the General Counsel to prove that a real question concerning representation existed when the Respondent renewed its contract with the ACA on February 3, 1950. Consequently, among other things, it was necessary that the General Counsel, to establish his *prima facie* case, produce evidence that the representation claim of the IBEW did encompass employees within an appropriate unit.⁷ This the General Counsel failed to do.⁸ Accordingly, we shall dismiss the complaint for lack of necessary evidence.

⁶ See our most recent holdings on the *Midwest Piping* doctrine, e. g. *Gulf Shipyards Storage Corporation*, 91 NLRB 181; *Sun Oil Company*, 89 NLRB 833; *International Harvester Company*, 87 NLRB 1123. These cases required the existence of a "real," "genuine," or "valid" question concerning representation for the finding of a *Midwest Piping* violation, they did not, as our dissenting colleague incorrectly assumes to support his position, rest solely upon the fact that a petition was pending when the employer signed the contract with the incumbent union.

⁷ We would distinguish, however, those issues commonly raised with respect to the determination of a question concerning representation, such as contract bar, which are in the nature of *affirmative defenses*, and which therefore need not be advanced in the General Counsel's *prima facie* case.

⁸ The introduction in evidence of the IBEW's petition does not constitute evidence of the alleged appropriate unit described therein, but serves only to prove that such a petition was placed on file with the Board.

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 William Penn Broadcasting Company, Philadelphia, Pennsylvania, be, and it hereby is, dismissed.

MEMBERS REYNOLDS and MURDOCK, concurring specially:

We concur in the principal opinion except that we would remand the case for further hearing on the issue of whether a question concerning representation existed when the Respondent executed its contract with the ACA, and in particular, whether the employees sought to be represented by the IBEW constitute an appropriate unit.⁹ As these issues were not litigated at the hearing already held, we believe that the parties should be given an opportunity to do so now in the light of the Board's decision herein. A remand would also enable us to decide the case upon the merits rather than upon a technical failure of the evidence, as the case now stands. We are constrained to agree, however, that on the actual record before us, the General Counsel has failed to make out a case. Because the vote for remand fails for want of a majority, we must necessarily join Chairman Herzog and Member Styles in the vote for dismissal.

MEMBER HOUSTON, dissenting:

I disagree with the conclusion of my colleagues that the Respondent did not violate the Act by executing a contract with the ACA in the face of the IBEW petition. My colleagues construe the *Midwest Piping* doctrine as permitting an employer, in the interest of continuous collective bargaining in "an incumbent union situation," to determine the existence of a "real" question concerning representation, including the appropriate unit issue. I am in full sympathy with the general policy of promoting continuous collective bargaining, but not to the extent of departing from the *Midwest Piping* doctrine by depriving employees of their right under the Act freely to select the Union of their own choosing.

In *Midwest Piping* and cases which followed,¹⁰ the Board held that an employer usurped the Board's exclusive function to determine questions concerning representation by executing an exclusive bargaining contract with one union in the face of a rival union's petition pending before the Board. In such circumstances, the Board defined an employer's obligation as one of strict neutrality pending Board

⁹ To this limited extent, we would also grant motion to intervene of the ACA, which, by its own choice, took no part in the hearing held.

¹⁰ *I Spiewak & Sons*, 71 NLRB 770; *Radio Corporation of America*, 74 NLRB 1729; *The Standard Steel Spring Company*, 80 NLRB 1082, enf den, 180 F. 2d 942 (C. A. 6); *International Harvester Company*, 87 NLRB 1123, *Sun Oil Company*, 89 NLRB 833.

investigation of the petition, thereby assuring to employees the free choice of bargaining representatives guaranteed by the Act. Under some circumstances, the Board has held that the pendency of a petition did not create a "real" question concerning representation as where the petitioning union became defunct¹¹ or the petition was untimely filed.¹² None of these cases relied upon the presence or absence of "an incumbent union situation" as solely dispositive of whether the Board would follow the pendency of a petition or the "real" question test.¹³ None of these cases permitted an employer to resolve the appropriate unit issue in determining whether or not a "real" question concerning representation existed.

Now for the first time, however, the majority decides that in "an incumbent union situation," the Board will look only to the existence of a "real" question concerning representation, and that an employer may resolve the appropriate unit issue. By thus sanctioning employer determination as to which contending union represents the uncoerced will of a majority of employees in an appropriate unit, my colleagues have departed from the *Midwest Piping* doctrine of employer neutrality pending Board determination of such questions. Mindful of the pressures caused by rival union conflict, in incumbent no less than in initial bargaining situations, I am unable to agree that employer determination of representation questions will adequately protect employees' free choice of bargaining representatives. Nor does the fact that the Board may ultimately determine whether a "real" question existed serve, as the majority asserts, as an adequate safeguard of employee rights under the Act where an employer has executed a contract with an incumbent union despite the existence of a "real" question. By executing the contract, the employer encourages his employees to become and remain members of the contracting union, thereby interfering with a free choice of bargaining representatives in an election which the Board may thereafter direct.

The majority maintains that an employer acts no differently in determining representation questions than when he makes interpretations of law in his business activities which may later prove incorrect. But the majority overlooks the fact that in the interest of unhampered selection of bargaining representatives, the Act precludes an employer from recognizing one of two rival unions until the Board determines the authorized representative.

¹¹ *Ensher, Alexander & Barsom, Inc.*, 74 NLRB 1443.

¹² *Lift Trucks, Inc.*, 75 NLRB 998; *Gulf Shapside Storage Corporation*, 91 NLRB 181.

¹³ Cf. *International Harvester Company*, *supra*, involving "an incumbent union situation," where the Board in effect applied the pendency of a petition rule, with *Gulf Shapside Storage Corporation*, *supra*, also involving "an incumbent union situation," where the Board applied the "real" question or timeliness rule. See *The Hoover Company*, 90 NLRB 1614, where the Board stated the *Midwest Piping* doctrine as applying "only if at the time recognition [of one of the competing unions] is granted, the question concerning representation raised by the rival petition is still pending"

My colleagues advance the interruption of continuous collective bargaining entailed in processing "specious" rival union claims as added reason for a rule of employer determination of the representation issue in "an incumbent union situation." I have no doubt, however, that such claims are expeditiously disposed of at the Regional Office level. Moreover, once it has been administratively determined that a rival union petition presents a claim which is *prima facie* sufficient to warrant the holding of an election, and notice of hearing has issued, it can no longer be said that such claim is "clearly unsupportable" or "specious."

I am convinced that temporary postponement of bargaining relations is not too great a price to pay for the stabilizing effects of an orderly selection of bargaining representatives by Board election. I would therefore find, under the circumstances of this case, that by executing a contract with the ACA with knowledge of the pending IBEW petition, the Respondent violated the Act.

Intermediate Report

E. Don Wilson, Esq., Philadelphia, Pa., for the General Counsel.

Mr. William Chanoff, Philadelphia, Pa., for the Respondent.

Mr. Freeman S. Hurd, Washington, D. C., for the International Brotherhood of Electrical Workers, AFL

STATEMENT OF THE CASE

This proceeding arose upon a charge filed on February 6, 1950, by International Brotherhood of Electrical Workers, AFL, against William Penn Broadcasting Company. Upon the basis of such charge, the General Counsel of the National Labor Relations Board, acting through the Regional Director of the Fourth Region (Philadelphia, Pennsylvania), issued a complaint against the named company on May 17, 1950. This alleged that the Company had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (2) and Section 2 (6) and (7) of the National Labor Relations Act, as amended by the Labor Management Relations Act (61 Stat. 136).¹ Copies of the complaint and of the charge upon which it was based, together with notice of hearing thereon, were duly served upon the Respondent, the International Brotherhood of Electrical Workers, AFL, and the American Communications Association, CIO.

The complaint alleged in substance that the Respondent engaged in unfair labor practices: (1) on and since February 3, 1950, by interfering with, restraining, and coercing its employees in the rights guaranteed in Section 7 of the Act; and (2) on and since February 3, 1950, by recognizing the Association as the exclusive bargaining agent of its employees, by negotiating a collective bargaining agreement with the Association, and by increasing the wages of its employees, notwithstanding that since December 3, 1949, there has been pending before the Board, a petition by IBEW, raising the question of represen-

¹ Reference in this Report will be: the General Counsel and his representative at this hearing, as General Counsel; William Penn Broadcasting Company, as the Respondent or the Company; International Brotherhood of Electrical Workers, AFL, as IBEW; American Communications Association, CIO, as the Association; the National Labor Relations Board, as the Board; the Labor Management Relations Act, as the Act.

tation of the Respondent's employees. Thereby, it alleged, the Respondent had deprived its employees of the exercise of the rights guaranteed in Section 7 of the Act.

The answer of the Respondent was submitted informally by a letter. It admitted the jurisdictional facts, but denied the unfair labor practices.

Pursuant to notice, a hearing was held at Philadelphia, Pennsylvania, on June 5, 1950, before Hamilton Gardner, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The General Counsel was represented by counsel and the Respondent and IBEW by authorized representatives. Adequate opportunity was afforded at the hearing to the Association to appear by counsel or representative but it remained unrepresented. Full opportunity was presented all parties to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. No witnesses testified but documentary proof was submitted and received and the parties entered into various stipulations. The General Counsel made a brief statement at the beginning of the hearing and the representative of the Respondent offered short statements at its conclusion. The parties were advised of their right to file proposed findings of fact, conclusions of law, and briefs. No party submitted anything.

Upon the entire record in the case, I make the following :

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

William Penn Broadcasting Company is a corporation of the Commonwealth of Pennsylvania with its principal office and place of business at Philadelphia, therein, and is a wholly owned subsidiary of Sun Ray Drug Company, likewise a Pennsylvania corporation. It is engaged in the business of operating Radio Station WPEN, AM and FM, at Philadelphia. In so doing it transmits by radio entertainment, advertising, news, and other intelligence into the Commonwealth of Pennsylvania and the States of Delaware and New Jersey. For such service it receives an annual income of over \$100,000 of which 80 percent is of advertising nationally known products and services. In all categories the Respondent employs approximately 50 people, of whom 13 are technicians. The pleadings admit and it was stipulated in open hearing that the Respondent is engaged in commerce within the meaning of the Act. It is so found.

II. THE LABOR ORGANIZATIONS INVOLVED

The Respondent's answer admits and the parties stipulated at the hearing that IBEW and the Association are labor organizations within the meaning of Section 2 (5) of the Act. I so find.

III. THE UNFAIR LABOR PRACTICES

A. *Interference, restraint, and coercion*

No evidence is found in the record of direct violation of Section 8 (a) (1) of the Act. Any such contravention is derivative only, arising from acts interdicted by Section 8 (a) (2).

B. *Domination, interference, contribution, or support to the Association*

The complaint alleges the Respondent violated Section 8 (a) (2) with respect to its relations to the Association. No claim is made by the General

Counsel of domination, interference, or financial contribution. He bases his case on "other support to it."

All the facts are either stipulated or undisputed.

Only the technicians in the Respondent's station are involved in this proceeding.

For about 12 years before the period here in question the Respondent had entered into a succession of contracts with the Association covering all of its production employees, including the technicians. On December 13, 1949, IBEW filed a petition with the Board for "Certification of Representatives." This described a unit made up of "all broadcast technicians and engineers employed at Station WPEN and WPEN-FM" and excluded "all other employees." The Fourth Regional Director gave written notice of such filing to the Respondent on the same date. Likewise, IBEW, on December 12, 1949, wrote the Company to the same effect. The record shows and the Respondent acknowledged receipt of both these communications. This representation case is still pending before the Board as Case No. 4-RC-613. No hearing or election has been held.

Notwithstanding the pendency of this matter, the Respondent, on February 3, 1950, recognized the Association as the exclusive representative of all its production employees and negotiated and executed a written contract with the Association dealing with wages, hours, and other terms and conditions of employment. Moreover the Respondent simultaneously granted a wage increase to its employees.

Such are the facts. Do they constitute a violation of Section 8 (a) (2)?

Here is involved the doctrine of the *Midwest Piping* case.² There the Board laid down the rule that "the respondent, by executing a 'union shop' agreement with the Steamfitters in the face of the representation proceedings pending before the Board, indicated its approval of the Steamfitters, accorded it unwarranted prestige, encouraged membership therein, discouraged membership in the Steelworkers, and thereby rendered unlawful assistance to the Steamfitters" in violation of the Act.

The Board last considered the *Midwest Piping* doctrine in the very recent *Hoover Company* case.³ There, under facts somewhat different from the proceeding at bar, it applied the *Midwest Piping* rule. Footnote 9 states that "Chairman Herzog is reluctant, for still another reason, to apply the principle of the *Midwest Piping* case" because of "two recent decisions by the courts."

The first such decision is *N. L. R. B. v. Flotill Products, Inc.*⁴ But the facts in that case are clearly distinguishable from the present one. There an election had been held and a clear majority was shown for the union with which the company had formerly entered into contracts. On the present record this Respondent possessed no such knowledge, but had been clearly informed by the IBEW petition that a majority of the technicians desired that organization as their bargaining representative.

The second decision was *N. L. R. B. v. Standard Steel Spring Co.*⁵ But there again facts were present to take the case out of the *Midwest Piping* doctrine which do not obtain in the proceeding now under consideration. In the *Standard Steel Spring* case the original petitioners in the powerhouse division of the plant had subsequently disavowed their choice and so notified the Board officially. No such situation arose here.

² *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060, 1069-1071.

³ *The Hoover Company*, 90 NLRB 1614.

⁴ 180 F. 2d 441 (C. A. 9).

⁵ 180 F. 2d 942 (C. A. 6).

Conclusion

Under the present state of facts the *Midwest Piping* doctrine clearly applies, since no circumstances are present which take the case out of that rule. It is not an extension of that doctrine but a clear application. It is therefore concluded that the Respondent violated Section 8 (a) (2) and Section 8 (a) (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

It is found that the activities of the Respondent set forth in Section III, above, occurring in connection with its operations 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 Respondent has engaged in certain unfair labor practices, the Trial Examiner will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purpose of the Act.

It has been found that the Respondent rendered "other support" to the American Communications Association, CIO. The undersigned will recommend that the Respondent shall withdraw all recognition from the Association as the bargaining agent for the technician employees; shall completely disassociate itself from the Association as such representative; and shall not deal with it on any matters pertaining to grievances, labor disputes, wages, hours, or other conditions of employment as to said technicians.

In view of all the circumstances in this case a broad general cease and desist order seems uncalled for and is not recommended.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. International Brotherhood of Electrical Workers, AFL, and American Communications Association, CIO, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By rendering "other support" to the American Communications Association, CIO, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (2) and Sections 8 (a) (1) of the Act.

3. Said unfair labor practices are unfair labor practices within the meaning of Section 2 (6) and (7) of the Act.

[Recommended order omitted from publication in this volume.]

SCOTTEN DILLON COMPANY, PETITIONER *and* TOBACCO WORKERS INTERNATIONAL UNION, LOCAL 13, AFL *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE No. 82. *Case No. 7-RM-63. April 2, 1951*

Decision and Order

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before W. A. Reinke, hearing 93 NLRB No. 194.