In the Matter of AMERICAN FINISHING COMPANY *and* MACHINE PRINTERS BENEFICIAL ASSOCIATION OF THE UNITED STATES

Case No. 32–CA–108.—Decided August 8, 1950

DECISION AND ORDER

On April 27, 1950, Trial Examiner David F. Doyle 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.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Houston and Murdock].

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 Respondent's exceptions and briefs,[1] and the entire record in the case,[2] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, American Finishing Company, Memphis, Tennessee, and its officers, agents, successors, and assigns, shall:

[1] The Respondent filed no separate brief in support of its exceptions but relied upon the brief which is filed in Case No. 32–RC–100, the representation proceeding which gave rise to the certification of the Union as representative of the employees herein, and the memorandum brief which it filed with the Trial Examiner in the instant case. Both briefs have been considered by the Board.

[2] Pursuant to a stipulation of the parties, the Trial Examiner received in evidence the entire record in Case No. 32–RC–100. This record, as well as the entire record in the instant case, has been considered by the Board.

1. Cease and desist from:

(a) Refusing to bargain collectively with the Machine Printers Beneficial Association of the United States as the exclusive representative of all machine printers and their apprentices employed at the Respondent's Memphis, Tennessee, plant, excluding all other employees, guards, and supervisors as defined in the Act:

(b) In any manner interfering with the efforts of the Machine Printers Beneficial Association of the United States to bargain collectively with it in behalf of the employees in the aforesaid appropriate unit.

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

(a) Upon request, bargain collectively with the Machine Printers Association of the United States as the exclusive bargaining representative of all the employees in the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its plant in Memphis, Tennessee, copies of the notice attached to the Intermediate Report marked Appendix A.[3] Copies of said notice, to be furnished by the Regional Director for the Fifteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 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 Fifteenth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

CHAIRMAN HERZOG, dissenting:

I dissent, believing the unit found in the representation case to have been inappropriate, for reasons set forth in my separate opinion there. (86 NLRB 412.)

[3] This notice, however, shall be and it hereby is amended by striking from the first paragraph thereof the words "The Recommendations of a Trial Examiner" and substituting in lieu thereof the words "Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order" the words "A Decree of the United States Court of Appeals Enforcing."

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Mr. Charles A. Kyle, for the General Counsel.

Messrs. Herbert Glazer and *William W. Goodman*, of Memphis, Tenn., for the Respondent.

Mr. Eric W. Lindburgh, of Barrington, R. I., for the Union.

STATEMENT OF THE CASE

Upon a charge duly filed on January 27, 1950, by Machine Printers Beneficial Association of the United States, herein called the Union, the General Counsel of the National Labor Relations Board, herein called the General Counsel and the Board, respectively, by the Regional Director for the Fifteenth Region (New Orleans, Louisiana), issued a complaint dated February 27, 1950, against American Finishing Company, Memphis, Tennessee, herein called the Respondent, alleging that the Respondent had engaged in and was 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, 61 Stat. 136, herein called the Act. Copies of the charge, complaint, and 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: (a) All machine printers designated by Respondent as assistant foremen, and their apprentices, at the Respondent's Memphis, Tennessee, plant, excluding all other employees, guards, 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; (2) at all times since November 3, 1949, the Union has been the exclusive representative of all employees in the above-described appropriate unit; (3) on January 10, 1950, and at all times thereafter, the Respondent has refused to bargain collectively with the Union as the exclusive representative of the employees in the aforesaid appropriate unit; and (4) by the foregoing conduct Respondent has engaged in and is engaging in unfair labor practices violative of Section 8 (a) (1) and (5) of the Act.

In its answer, duly filed herein, the Respondent admitted certain of the allegations contained in the complaint but denied it had engaged in unfair labor practices within the meaning of the Act.

Pursuant to notice, a hearing was held on March 14, 1950, at Memphis, Tennessee, before David F. Doyle, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. At the hearing the General Counsel and the Respondent were represented by counsel; the Union was represented by its executive secretary. Full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues was accorded all parties. At the close of the hearing the undersigned granted a motion by the General Counsel to conform the pleadings to the proof as to dates and minor variations and reserved ruling on the Respondent's motion to dismiss the complaint. The motion is hereby denied. All the parties were afforded opportunity to present oral argument at the close of the hearing and to file briefs and/or proposed findings of fact and conclusions of law with the undersigned. Counsel for the General Counsel and the Respondent presented oral argument at the close of the hearing, and both later filed briefs with the undersigned. After the close of the hearing Counsel for the General Counsel made a motion, in which he was joined by the Respondent, to correct certain errors in the transcript of record. The Union made no objection to the proposed corrections. An order authorizing

and directing the specific corrections was granted by the undersigned on April 13, 1950.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

American Finishing Company is a Tennessee corporation having its principal place of business at Memphis, Tennessee, where it is engaged in bleaching, dyeing, finishing, printing, sanforizing, coating, and performing other related processes upon cotton textiles. In the course and conduct of its business Respondent annually purchases raw materials, including dyes and starches, of a value in excess of $100,000. Seventy-five percent of this raw material is shipped to the Respondent from points outside the State of Tennessee. Annually the Respondent ships and delivers to its customers products of a value in excess of $100,000. Of the products so shipped more than 50 percent is shipped outside the State of Tennessee. The Respondent has conceded, the Board has found, and the undersigned now finds, that the Respondent is engaged in interstate commerce within the meaning of the Act.[1]

II. THE LABOR ORGANIZATION INVOLVED

Machine Printers Beneficial Association of the United States is a labor organization admitting to membership employees of the Respondent.[2]

III. THE UNFAIR LABOR PRACTICES

A. *Introduction: the representation proceeding*

The sole issue in the instant proceeding is whether Respondent has refused to bargain collectively with the Union and has thereby violated Section 8 (a) (1) and (5) of the Act. Respondent admits in its answer that "it did not accept the offers on or about January 10, 1950, and on or about January 20, 1950, of the Machine Printers Beneficial Association of the United States to bargain collectively." As will be seen below, Respondent asserts as a defense to its refusal to bargain the contention that the unit as found by the Board in its Decision and Direction of Election in Case No. 32–RC–100, *American Finishing Company* and *Machine Printers Beneficial Association of the United States*, 86 NLRB 412, is not appropriate. A short review of the representation proceeding will demonstrate that the contentions of the Respondent on the unit issue have been heard and determined by the Board in that proceeding.

On November 17, 1948, the Union filed a petition requesting certification of representatives for a unit of the Respondent's employees described as, "all machine printers including line foremen, and journeymen and apprentices employed in the printing department of the Employer," excluding clerical and office employees, professional and technical employees, and all other employees and supervisors as defined in the Act. Pursuant to notice a representation proceed-

[1] This finding is based on the testimony, exhibits, and stipulations of the parties, and the Board's Decision and Direction of Election in *American Finishing Co.*, 86 NLRB 412, Case No. 32–RC–100, hereinafter referred to as the representation proceeding, and the pleadings, stipulations, exhibits, and testimony in the instant case.

[2] To the same effect as footnote 1 above.

ing was conducted before a hearing officer at Memphis, Tennessee, on January 20, 21, 22, and on March 24 and 25, 1949. A full opportunity was afforded all parties to present evidence. At the hearing and in its brief addressed to the Board, the Respondent assumed the position that certification should not be granted to the Union for the following reasons: (1) That a collective bargaining agreement between the Respondent and the Textile Workers Union of America, CIO, was a bar to the petition; (2) that the proposed unit is inappropriate; (3) that all of the employees in the proposed unit are supervisors as defined in the Act; and (4) that it was prejudicial error for the hearing officer to exclude testimony in reference to the drift and trend of the textile industry away from the New England and Atlantic States.[3]

On October 6, 1949, the Board issued its decision and direction of election in the representation case finding, among other things, that "the machine printers designated by the Employer as assistant foremen are an identifiable, skilled, and homogeneous craft (or apprentice craft) group and constitute a unit appropriate for purposes of collective bargaining. . . ."

On November 3, 1949, pursuant to the direction of election, an election by secret ballot was conducted under the supervision of the Regional Director for the Fifteenth Region. Of the eight voters eligible to vote in the election, all eight voted in favor of the Union.

On November 7, 1949, the Respondent filed timely objections to the conduct of election in conformity with the Board's Rules and Regulations. The grounds for objection were that (1) all of the employees who voted in said election were supervisors within the meaning of the National Labor Relations Act, (2) all of said employees were not members of an appropriate unit or craft, and (3) all the other grounds included in the record of the case.

On November 22, 1949, the Regional Director of the Fifteenth Region issued his report on election and objections to election, recommending that the Board issue a certificate of representatives to the Union as the exclusive representative of all the employees in the unit found appropriate by the Board.

On November 30, 1949, the Respondent filed with the Board exceptions to the conclusions and recommendations of the Regional Director in regard to the election, stating the grounds of exception as follows: (1) That all the employees who voted in said election are supervisors within the meaning of the Act and are not members of an appropriate unit or craft, and all of the other grounds contained in the record of the case; (2) that James McNair, an employee in the unit, was allowed to act as an observer for the Union despite the objection of the Respondent that McNair was a supervisor within the meaning of the Act and was therefore disqualified to act as an observer;[4] and (3) that the vote of each and every one of the eight employees who voted in said election was challenged by the observer for the Respondent.

On January 5, 1950, the Board issued its supplemental decision and certification of representatives in which it certified "that Machine Printers Beneficial Association of the United States has been selected by a majority of the journeymen, machine printers and their apprentices, employed by American Finishing Company at its Memphis, Tennessee, plant as their representative for the purposes of collective bargaining. . . ."

On January 18, 1950, the Respondent filed with the Board a petition to rehear and correct the supplemental decision and certification of representatives on

[3] The hearing officer excluded evidence on this point at the hearing, to which the Respondent took exception. The point was fully argued by Respondent in its brief to the Board.

[4] This exception is derivative from the first exception.

the ground, that the employees in the unit as defined, were supervisors within the meaning of the Act and that the supplemental decision and certification of representatives should be corrected by the deletion of the word "journeymen" in the description of the unit.

On February 7, 1950, the Board issued its order denying the petition and correcting the supplemental decision and certification of representatives. This order permitted the correction petitioned for by deleting the word "journeymen" from the description of the unit, and denied the petition for a rehearing.

From the above review it is seen that in each step of the representation case the Respondent contested the Board's unit finding, urging that all the employees, in the unit found by the Board, are supervisors within the meaning of the Act. In the instant proceeding all parties stipulated that the entire record in the representation proceedings be admitted in evidence, and under the stipulation was received in evidence by the undersigned.

B. *The refusal to bargain*

1. The appropriate unit

The complaint alleges that all machine printers designated by Respondent as assistant foremen and their apprentices in the Respondent's Memphis, Tennessee, plant, excluding all other employees, guards, 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. This is the unit found by the Board to be appropriate in the representation proceeding, and for which the Board on January 5, 1950, certified the Union as exclusive bargaining representative.

Respondent in the instant proceeding raises again the identical contention that the unit established by the Board is inappropriate because the employees within the unit are supervisors within the meaning of the Act. The position of the Respondent is that the determination of the Board in the representation proceeding is "so obviously wrong and incorrect that it should be considered as an arbitrary decision."

The Respondent bases this contention entirely on the evidence adduced in the representation proceeding. The undersigned has reviewed the evidence in that proceeding, and is not persuaded that the Respondent received an arbitrary or capricious determination from the Board. The hearing in the representation case, consumed 5 days, and 674 transcript pages. Evidence was adduced on all material elements of the unit question. All 8 employees in the unit testified, as did 3 shift foremen. Witnesses for the Company were its president, vice president, and superintendent of printing. Because of the keen interest of the parties and the vigor of their counsel, the hearing appears to have been conducted in an unusually intensive and thorough manner. Certainly the Board had ample testimony on all the issues in the case, and its decision is based on substantial evidence.

The undersigned can find nothing arbitrary or capricious in the Board's decision and direction of election. It is true the decision was rendered by a divided Board,[5] but this fact alone cannot be the basis for terming the decision arbitrary or capricious. Examination of the decision discloses that careful consideration was given to the Respondent's contentions, as espoused by the minority. However, the majority rejected these contentions for very sound reasons which are stated in the decision.

[5] Members Houston, Reynolds, and Murdock composed the majority. Chairman Herzog and Member Gray, separately, dissented in part.

In his brief, counsel for the Respondent relies heavily on the decision of the circuit court of appeals, in *Ohio Power Company* v. *N. L. R. B.*, 176 F. 2d 385 (C. A. 6), certiorari denied, 338 U. S. 899. He points out that in that case the court held that a person who "responsibly directs" other employees without having other supervisory authority is a supervisor within the meaning of the Act, and he contends that the assistant foremen here involved, are clearly supervisors when their duties and authority are considered in the light of that decision.

Counsel for Respondent further contends that the undersigned has the authority under Section 7 (b) 8 of the Administrative Procedure Act, and Section 102.45[6] of the Rules and Regulations of the Board to find that the employees in question are supervisors under the Act, and/or that the unit is not appropriate, contrary to the prior determination of the Board in the representation proceeding.

The undersigned does not agree with either of these contentions.

Comparison of the facts in the *Ohio Power Company* case, *supra*, with the facts in the instant case, demonstrates that the two cases are clearly distinguishable. In the *Ohio Power Company* case there was no question but that the control operators (the employees in issue) had been *authorized in fact* to direct other employees. In that case the Board and the Court were concerned primarily with the *scope* of authority, which had been delegated by the company. The decision in the case is firmly based on the scope of the control operator's authority. This is seen from the testimony in the case, quoted by the Court in its decision. The quoted testimony is as follows:

> Q. And it is necessary for him to make decisions on the spot?
>
> A. Particularly when there are emergencies, but in a routine way as to various adjustments.
>
> Q. But he has to do those things on his own initiative?
>
> A. He makes those decisions on his own initiative.
>
> Q. And the decisions which he makes are such as to control the operation of the entire unit?
>
> A. That is correct.
>
> Q. And thereby they control the entire output of the plant as it is now constituted?
>
> A. That is correct.

Later in the decision the court points out that in the years 1947–1948 when emergencies arose because of frozen coal that the control operators actually used the authority to "responsibly direct" the operations of the entire plant and of all needed employees.

The record in the representation case, here involved, presents a far different picture. Here, there is a very serious question, as to whether certain authority was ever *in fact delegated or conferred.* The testimony of company officials reveals that at various times the assistant foremen were instructed verbally, or by written memorandum, that they had duties and powers of a supervisory nature. However, some of the men appeared to accept these as mere gestures, which did not in fact confer the power or authority upon them. Thus, the record reveals several of these reminders on different occasions. However, at the hearing in the representation case, some of the men testified that they were still doubtful, or still did not know whether the ostensibly delegated authority, had in fact been delegated, or whether the delegation of authority was an empty gesture made by the company for its own ulterior purposes. Thus in the instant case, there were two questions: (1) Was certain authority, *in fact, delegated* to these assistant

[6] Rules and Regulations of the Board do not contain a section numbered 102.45; Respondent evidently means Section 203.45.

foremen, and (2) if authority was delegated, was it supervisory in scope? These questions and, the Board's determination of them are expressed in the Board's decision as follows:

> The alleged delegation of authority to the assistant foreman by the Employer in August 1948, to take any action necessary to obtain the required quality and quantity of work, did no more than to confer upon the machine printers that authority generally possessed by a skilled craftsman over his apprentices, helpers, machines, and tools. We find that such an affirmation of an existing *duty falls short of conferring* upon these employees the powers of a supervisor. The memorandum of November 27, 1948, and the conferences of January 26, 1948, did, however, purport expressly to place the assistant foremen in the status of supervisors. However, we note that the memorandum of November 27 followed by 10 days the filing of the petition in this case on November 17, 1948. And the conference on January 26, 1949, occurred 2 days after the hearing was commenced and prior to its consummation on March 24, 1949. The timing of these *alleged affirmations of supervisory authority* upon the employees herein sought by the Petitioner compels us to scrutinize closely all of the surrounding factors in determining whether *such authority was, in fact,* granted to these employees. [Emphasis supplied.]
>
> Machine printers in the textile printing industry are not normally vested with the powers of a supervisor. Obviously, as pointed out in the dissent, the Employer is under no obligation to operate his business in accordance with the prevailing industry practice. However, it is pertinent to note that the machinery, the materials, and the printing process are exactly the same as generally are employed in the industry. Only in respect to supervision does the Employer allegedly deviate from the industry practice.
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> The record further discloses that, if the machine printers are supervisors, the ratio of supervisory to non-supervisory employees in the printing department is one to three, while the ratio of supervisory to nonsupervisory employees in the other plant departments is one to seven. Not only is the ratio in the printing department higher than in the other plant departments, but is higher than that prevailing in the textile printing industry. As we have previously stated, the ratio of supervisory to nonsupervisory employees is a factor which, although not determinative, must be considered.
>
> Finally, we do not think that the assistant foremen have exercised supervisory authority to the extent that they would have *if they, in fact, possessed such authority.* It is true, as our dissenting colleague points out, that if these employees are actually supervisors, the fact that they have not exercised supervisory authority does not destroy their supervisory status. However, we think that where an issue is as close as it is in this case, considerable weight must be given to the extent to which the alleged powers have been used. Admittedly there have been isolated instances in which some of these employees have engaged in activity indicative of a supervisor. However, sporadic and infrequent exercise of supervisory authority, as in the instant case,[7] does not in itself confer

[7] The record reveals that one machine printer discharged an employee on his crew for smoking in violation of the company rules (although he later took the employee back); another assistant foreman recommended that his brother-in-law be hired, which recommendation was given effect; some of the assistant foremen considered that they had the authority to discharge members of their crews; an employee was

supervisory status.[8] We find that the supervision exercised by the assistant foremen over the "backhelp" is that normally exercised by a skilled craftsman over his helper[9] and not that of a supervisor over an employee.[10] We conclude, therefore, that assistant foremen are employees within the meaning of the Act. [Emphasis supplied.]

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discharged by the superintendent of printing as a result of an assistant foreman's recitation of events to the superintendent of printing; and another employee was discharged when an assistant foreman told the superintendent of printing that either the employee would "have to go" or that he, the assistant foreman, would quit.

[8] *Matter of Todd Shipyards Corporation,* 80 NLRB 382; *Matter of U. S. Gypsum Company,* 79 NLRB 1059; *Matter of General Motors Corporation,* 78 NLRB 72.

[9] The record discloses that the assistant foremen consider that they are in charge of the machines and responsible for the men under them. They direct and instruct the machine crew in their duties; and the latter must take orders and instructions from them.

[10] *Matter of General Steel Tank Co.,* 81 NLRB 1345.

Member Gray, in his opinion dissenting in part, plainly states the issue that distinguishes the instant case from *Ohio Power Company, supra.* He writes as follows:

"The majority implies that the timing of the above confirmations of supervisory authority casts suspicion upon the Employer's motive. However, the issue is not the Employer's motive, *but whether the Employer did, in fact,* delegate this authority to these individuals. I will assume, arguendo, that the Employer's actions were motivated by a desire on its part to avoid any obligation it may have to bargain with the Petitioner if these individuals were not supervisors. There is nothing in the amended Act, and I am aware of no prior Board decisions, that prohibits an employer from doing just that." [Emphasis supplied.]

"The majority found that the Employer, while professing to confer supervisory authority upon these employees, did not in fact do so. They rely upon the following factors to support their conclusion that the Employer did not mean what it said: (1) *A contrary practice prevailing in the industry;* (2) *the high ratio of supervisory to non-supervisory employees;* (3) *the infrequent exercise of supervisory authority by these employees;* and (4) *the existence of the relationship of a skilled craftsman to his helper."* [Emphasis supplied.]

Because of this clear distinction between the two cases, the undersigned does not agree with the Respondent that the instant case is controlled by the decision in *Ohio Power Company, supra.*

Nor does the undersigned agree with Respondent's contention that the undersigned has authority, by virtue of Section 7 (b) (8) of the Administrative Procedure Act, and Section 102.45 of the Rules and Regulations of the Board, to find that the employees in question are supervisors, and/or that the unit is not appropriate contrary to the prior decision of the Board in the representation proceeding.

At the hearing in the instant case Respondent failed to proffer new evidence, or evidence unavailable at the time of the representation case, or evidence tending to show that a change had occurred in the facts underlying the decision of the Board as to unit, from the time of the decision, to the date of the instant hearing. In fact, the testimony in the instant hearing was to the effect that no change of circumstances had occurred as to the unit within the time stated. The only new matter is in the form of another memorandum from the company to the assistant foremen which "reminds" them that they are directly responsible for their machine, along with the men in their crews and the quality and quantity of the work

turned out. Such proof raises no new issue not previously submitted to and considered by the Board prior to its certification of the Union as the exclusive representative of Respondent's employees in the appropriate unit.

It has long been the policy of the Board not to permit a respondent to relitigate, in a subsequent unfair labor practice proceeding involving charges of a refusal to bargain with a certified representative, the issues decided in a prior representation proceeding. In the absence of new evidence, or evidence of a change in the facts surrounding a prior unit determination, or the presentation of evidence unavailable to the respondent in the prior representation proceeding, the Board has uniformly refused to redetermine these issues in an unfair labor practice proceeding.[7]

Accordingly the undersigned finds pursuant to the Board's previous determination, and as alleged in the complaint, that all machine printers designated by Respondent as assistant foremen and their apprentices at the Respondent's Memphis, Tennessee, plant, excluding all other employees, guards, and supervisors as defined in the Act constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

2. Representation by the Union of a majority in the appropriate unit

As stated more at length above, the Union won the election conducted on November 3, 1949, and was certified by the Board as collective bargaining representative of the employees in the aforesaid appropriate unit on January 5, 1950.

The undersigned finds that on and after January 5, 1950, the Union was the duly designated bargaining representative of the employees in the aforesaid appropriate unit and pursuant to Section 9 (a) of the Act the Union was on January 5, 1950, and still is, the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The refusal to bargain

Proof of the unfair labor practices alleged in the complaint was contained in an exchange of letters which were introduced in evidence pursuant to a stipulation of the parties, as follows:

(1) On January 10, 1950, the Union, by its secretary, requested that a time be set for a conference for the purpose of instituting collective bargaining for the employees of the Respondent in the unit. The Union expressed a willingness to meet at any time or place convenient to the Respondent.

[7] *Clark Shoe Company* and *United Shoe Workers of America, C. I. O.*, 88 NLRB 989. The decision reads:

> The Respondent takes the position that the Trial Examiner cannot hold himself bound by the Board's findings in the prior representation case; that it is entitled to an "independent determination" by the Trial Examiner of the issues decided in the R case; and that under Section 7 (b) (8) of the Administrative Procedure Act, the Trial Examiner should make such a determination because he is authorized to "make decisions or recommend decisions." We agree with the Trial Examiner that unless there is evidence which was newly discovered or unavailable to the Respondent at the time of the representation hearing, it cannot be permitted to relitigate in the instant proceeding the question of majority or the appropriate unit. . . . Nor do we find anything in the Administrative Procedure Act which supports the Respondent's position.

N. L. R. B. v. *Worcester Woolen Mills Corp.*, 170 F. 2d 13 (C. A. 1), cert. denied 336 U. S. 903; *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146; *Allis-Chalmers Manufacturing Co.* v. *N. L. R. B.*, 162 F. 2d 435 (C. A. 7); *N. L. R. B.* v. *West Kentucky Coal Company*, 152 F. 2d 198 (C. A. 6), cert. denied 328 U. S. 866; *N. L. R. B.* v. *Anwelt Shoe Manufacturing Co.*, 93 F. 2d 367 (C. A. 1)

(2) On February 14, 1950, (after the Board had corrected the Supplemental Decision and Certification of Representatives, as set forth above) the Union, by its secretary, again requested a time be set for a conference for the purpose of instituting collective bargaining on behalf of the employees represented by the Union.

(3) On February 16, 1950, the Respondent, by William W. Goodman, its treasurer, refused to bargain with the Union in the following words, "Solely in order to make it possible to have said courts review said October 6, 1949, decision of the National Labor Relations Board, as supplemented on January 5 and February 7, 1950. American Finishing Company refuses to bargain with the Machine Printers Beneficial Association of the United States at this time."

In his statement of the Respondent's position at the close of the hearing, counsel for the Respondent said, "that the refusal of the American Finishing Company to bargain with the Machine Printers Beneficial Association of the United States is not done with any idea of vindictiveness or any disregard for the Union, but the only purpose is to get a review by this Trial Examiner at this hearing and probably also by the Board and, if necessary, by the courts."

The above letters reveal, Respondent admits in its answer and by its statement in open court, and the undersigned finds that on or about January 10, 1950, and at all times thereafter Respondent has refused and is refusing to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, and has thereby interfered with, restrained, and coerced its 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 Respondent set forth in Section III, above, occurring in connection with the operations of Respondent described 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 Respondent has engaged in certain unfair labor practices it will be recommended that the Respondent cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. Having also found that the Union represented and now represents a majority of the employees in the appropriate unit and that the Respondent has refused to bargain collectively with it, the undersigned will recommend that the Respondent, upon request bargain collectively with the Union.

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

CONCLUSIONS OF LAW

1. The Machine Printers Beneficial Association of the United States is a labor organization within the meaning of Section 2 (5) of the Act.

2. All machine printers designated by Respondent as assistant foremen and their apprentices at Respondent's Memphis, Tennessee, plant, excluding all other employees, guards, and supervisors as defined by the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. The Machine Printers Beneficial Association of the United States was on January 5, 1950, and at all times thereafter, has been and 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 January 10, 1950, and at all times thereafter to bargain collectively with the Machine Printers Beneficial Association of the United States as the exclusive representative of all its employees in the aforesaid 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, as amended.

5. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act, as amended.

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

Upon 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, American Finishing Company, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Machine Printers Beneficial Association of the United States as the exclusive representative of all machine printers and their apprentices employed at the Respondent's Memphis, Tennessee, plant, excluding all other employees, guards, and supervisors as defined in the Act;

(b) In any manner interfering with the efforts of the Machine Printers Beneficial Association of the United States to bargain collectively with it in behalf of the employees in the aforesaid appropriate unit.

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

(a) Upon request, bargain collectively with the Machine Printers Beneficial Association of the United States as the exclusive bargaining representative of all the employees in the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its plant in Memphis, Tennessee, copies of the notice attached hereto, marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Fifteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 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; and

(c) Notify the Regional Director for the Fifteenth Region in writing within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps the Respondent has taken to comply herewith.

It is further recommended that, unless on or before twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order the

Respondent notifies said Regional Director in writing that it 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 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, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order 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 and Recommended Order. 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. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. 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 thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 27th day of April 1950.

DAVID F. DOYLE,
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, as amended, we hereby notify our employees that:

> WE WILL BARGAIN collectively upon request with MACHINE PRINTERS BENEFICIAL ASSOCIATION OF THE UNITED STATES, as the exclusive representative of all employees in the bargaining unit described herein with respect to wages, rates of pay, hours of employment, or other terms or conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:
>
> > All machine printers designated by the Employer as assistant foremen and their apprentices at the Employer's Memphis, Tennessee, plant, excluding all other employees, guards, and supervisors.

WE WILL NOT in any manner interfere with the efforts of the above-named union to bargain collectively with us, or refuse to bargain with said union as the exclusive representative of the employees in the bargaining unit set forth above.

AMERICAN FINISHING COMPANY,
(*Employer*)

By _____
(Representative) (Title)

Dated _____

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