

In the Matter of CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AND CITY NATIONAL SAFE DEPOSIT COMPANY, ITS WHOLLY-OWNED SUBSIDIARY, and PROTECTIVE SERVICE EMPLOYEES' UNION OF CHICAGO, LOCAL 240, AFFILIATED WITH BUILDING SERVICE EMPLOYEES' INTERNATIONAL UNION (A. F. OF L.)

*Case No. 13-C-2682.—Decided February 16, 1948*

*Mr. Herman J. DeKoven*, for the Board.

*Pope & Ballard*, by *Messrs. Ernest S. Ballard, T. C. Kammholz*, and *Henry M. Thullen*, all of Chicago, Ill., for the respondents.

*Daniel D. Carmell*, by *Mr. Lester Asher*, of Chicago, Ill., for the Union.

## DECISION

AND

## ORDER

On May 9, 1947, Trial Examiner James R. Hemingway issued his Intermediate Report in the above-entitled proceeding, finding that the respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondents and counsel for the Board filed exceptions and supporting briefs. The respondents also requested oral argument.

Subsequently, on September 22, 1947, the respondents moved to set aside the Intermediate Report and to dismiss the complaint, on the ground that the Labor Management Relations Act of 1947 made the issuance of any order in this case unlawful. The Union filed an answer to this motion, and the respondents later filed a reply brief. Both the Union and the respondents have requested oral argument on the motion. For the reasons stated hereinafter, the respondents' motion to dismiss the complaint is hereby granted. The requests for oral argument are denied, as the record and the briefs, in our opinion, adequately present the issues and the positions of the parties.

The Board has considered the Intermediate Report, the exceptions, the briefs, the motion papers, and the entire record in the case, and hereby adopts the findings and conclusions, but not the recommendations, of the Trial Examiner.

We agree with the Trial Examiner that the respondents are engaged in commerce within the meaning of the Act, that a single unit covering the employees of both companies is appropriate, and that the respondents' refusal to bargain with the Union was unlawful. However, since the issuance of the Intermediate Report herein, the Act has been amended by the Labor Management Relations Act, 1947, to provide that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."<sup>1</sup> The unit which the Union seeks to represent comprises guards. The Union is an affiliate of an organization which admits employees other than guards into membership. Accordingly, in view of the amendments to the Act and the Union's affiliation, we do not believe that an order should be made in this case requiring the respondents to bargain on the basis of a certification issued on July 26, 1943.<sup>2</sup> As the case involves only a refusal to bargain, we shall dismiss the complaint.<sup>3</sup>

### ORDER

IT IS HEREBY ORDERED that the complaint against the respondents, City National Bank and Trust Company of Chicago, and City National Safe Deposit Company, its wholly-owned subsidiary, Chicago, Illinois, be, and it hereby is, dismissed.

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

### INTERMEDIATE REPORT

*Mr. Herman J. DeKoven*, for the Board.

*Messrs. Pope & Ballard*, by *Messrs. Ernest S. Ballard, T. C. Kammholz*, and *Henry M. Thullen*, of Chicago, Ill., for the Respondents.

### STATEMENT OF THE CASE

Upon a second amended charge duly filed in February 10, 1947,<sup>1a</sup> by Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service

<sup>1</sup> Section 9 (b) (3) of the amended Act.

<sup>2</sup> *N L R B v Jones & Laughlin Steel Corporation*, 21 L. R. M. 2145, decided December 9, 1947 (C. C. A. 6); *N L R B v Atkins & Co.*, decided September 25, 1947, 165 F. (2d) 659 (C. C. A. 7).

<sup>3</sup> The Trial Examiner found that the respondents had violated Section 8 (1) by unilaterally granting wage increases. The respondents excepted to this finding on the ground that the complaint had alleged only that this conduct was violative of Section 8 (5). It is obvious, however, that, whether a violation of Section 8 (1) or of Section 8 (5), the gravamen in either case is non-recognition of the Union.

<sup>1a</sup> The original charge was filed on October 23, 1945, and the first amended charge on December 19, 1945. The latter was the first to charge a refusal to bargain.

Employees' International Union (A. F. of L.), herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Thirteenth Region (Chicago, Illinois), issued its complaint dated February 17, 1947, against City National Bank and Trust Company of Chicago, and City National Safe Deposit Company, its wholly-owned subsidiary, herein jointly called the Respondents (except when referred to individually, when they are called the Bank and the Safe Deposit Co., respectively), alleging that the Respondents had engaged in and were engaging in unfair labor practices within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint together with notice of hearing thereon were duly served upon the Respondents and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that since about August 9, 1943, the Respondents had failed and refused, upon the Union's request, to bargain collectively with the Union although the Union had on July 26, 1943, been certified by the Board as the exclusive representative of all the employees in an appropriate unit; that since July 26, 1943, the Respondents had unilaterally granted wage increases; and that on about March 31, 1944, the Safe Deposit Co. unilaterally made application to the National War Labor Board for approval of increases in salary ranges of employees in the unit without giving the Union an opportunity to bargain thereon.

The Bank and the Safe Deposit Co. filed separate but parallel answers denying that the Safe Deposit Co. was subject to the Board's jurisdiction, denying that the unit previously found by the Board to be appropriate was appropriate, and alleging that the Board's determination thereof was arbitrary and capricious. The answers admitted the refusal to bargain and the unilateral increases and application to the War Labor Board, but denied that they constituted unfair labor practices; and both answers alleged that the Union and the Board were guilty of laches.

Pursuant to notice, a hearing was held in Chicago, Illinois, on March 5, 6, and 7, 1947, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The Board and the Respondents were represented by counsel. No one entered an appearance on behalf of the Union. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the close of the Board's case, the Respondents moved to dismiss the complaint on the ground that the Board lacked jurisdiction of the subject matter and on the ground that the Board had failed to prove its case. The motion was denied without prejudice to the right to make a similar motion at the close of the hearing. The Respondents repeated this motion at the conclusion of the hearing and ruling thereon was reserved. It is now denied. The conclusions of fact and law hereinafter set forth explain the reasons for denial of the motion. Board's counsel moved at the end of the hearing to amend the pleadings to conform to the proof as to names, dates, and places. The motion was granted. The parties argued orally before the undersigned at the conclusion of the hearing and time was given in which to file briefs or proposed findings and conclusions with the undersigned. A brief has been filed by the Respondents.

During the course of the Respondents' case, the Respondents sought to introduce evidence tending to prove a loss of majority of the Union following its certification by the Board. When it appeared that the Respondents would require 2 or 3 days to put in such evidence, the undersigned suggested an offer of proof. The Respondents' counsel indicated that he would need a day in which to prepare such

offer of proof. The undersigned decided that, rather than adjourn the hearing over the week end merely to receive the offer of proof, the hearing would be closed on completion of the rest of the Respondents' case subject to the filing with the undersigned of a written offer of proof within a fixed time.<sup>2</sup> Such offer of proof has been filed and Board's counsel filed with the undersigned a brief in opposition to the offer, requesting the undersigned to reject the offer of proof. The undersigned has considered the Respondents' offer of proof and hereby rejects it for the reasons hereinafter set forth.

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

#### FINDINGS OF FACT

##### I THE BUSINESS OF THE RESPONDENTS

The Bank is now and has been since October 5, 1932, a national banking organization chartered under the National Bank Act. It is engaged in commercial, savings, and loan activities, personal and corporate trust service, installment financing for automobile dealers, foreign banking, and investment services. The Bank is a member of the Federal Reserve System and of the Federal Deposit Insurance Corporation. The physical properties of the Bank are located in space leased in the building at 208 South LaSalle Street, Chicago, Illinois.

As of December 31, 1946, the Bank was the 52nd largest commercial bank in the United States, had assets of the total value of \$335,281,966, and held United States Government securities of a face value of approximately \$160,806,000. As of that date its loans and discounts were valued at approximately \$79,543,000; it had deposits in the amount of approximately \$319,149,000; its capital, surplus, and undivided profits amounted to approximately \$10,409,000; and its letters of credit and acceptances were approximately \$3,176,000.

Its transit items to banks outside the State of Illinois, during the year 1946, amounted monthly to approximately \$152,400,000. It issued foreign letters of credit and travelers checks during the calendar year 1946 in the amount of approximately \$8,023,000.

As of December 31, 1946, the Bank maintained deposit accounts in 14 principal cities of the United States located in 10 States other than Illinois and maintained 13 deposit accounts in 9 foreign countries.

The Safe Deposit Co. is now, and has been since 1899, a corporation organized under and existing by virtue of the laws of the State of Illinois. It is engaged in the business of renting safe deposit space to the public. The physical properties of the Safe Deposit Co. are located in the building located at 208 South LaSalle Street, Chicago, Illinois, where it occupies space under a sub-lease from the Bank.

The annual rentals of safe deposit boxes by Safe Deposit Co. for the year 1947 total \$70,973. In 1946 it had additional income of \$1,326. The number of safe deposit boxes leased as of December 31, 1946, was 10,410. Boxes leased to customers whose stated mailing addresses were outside the State of Illinois number about 200.

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<sup>2</sup> The Respondents were likewise given time following the close of the hearing in which to apply to the proper agency for permission to see the files of the War Labor Board in a matter involving the present parties, the files not being fully available to the Respondents at the time, and to determine whether to offer from such file copies of any documents, other than those already received, as exhibits herein. The time granted has passed and no further exhibits have been offered.

All the stock of the Safe Deposit Co. is owned by the Bank. Each of the officers of the Safe Deposit Co., with the exception of the manager, is also an officer of the Bank, and each member of the Board of Directors of the Safe Deposit Co. is either a director or officer of the Bank.

The Respondents contend that the Board is without jurisdiction as to the Safe Deposit Co., on the ground that it is not engaged in commerce within the meaning of the Act, although they concede that the Bank is subject to the jurisdiction of the Board.

The Board has previously passed upon the contention of the Respondents that the operations of the Safe Deposit Co. in no way affect interstate commerce and rejected it in the Representation case from which this case stems.<sup>3</sup> The conditions from which the Board there concluded that the Bank and the Safe Deposit Co. were a single integrated enterprise still exist with no substantial change.<sup>4</sup> The Respondents argue that in every other case involving a parent and subsidiary which were treated as a single business enterprise the Board could have taken jurisdiction independently of either, whereas in this case the Safe Deposit Co.'s operations did not bring it within the application of the Act and that for this reason the Board's finding in the Representation case that both Respondents were subject to the jurisdiction of the Board was erroneous.

When two entities are engaged in a single integrated enterprise, it is immaterial that, because of the nature of its functions, one entity might not be subject to the jurisdiction of the Board if, contrary to fact, it were acting as no part of the integrated business.<sup>5</sup> The facts here adequately establish that the Bank and the Safe Deposit Co. are operated as an integrated enterprise. The undersigned therefore finds, contrary to the Respondents' contention, that the Respondents are engaged in commerce within the meaning of the Act.

## II. THE ORGANIZATION INVOLVED

Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.), is a labor organization admitting to membership employees of the Respondents.

## III. THE UNFAIR LABOR PRACTICES

### A. *The refusal to bargain collectively*

#### 1. The appropriate unit

The complaint alleged, "As found by the Board in its Decision and Direction of Election dated June 15, 1943, . . . (in the Representation case) all members of the day police, night force, and deputies employed by respondent Bank

<sup>3</sup> In the *Matter of City National Bank and Trust Company, et al.*, 50 N. L. R. B. 516

<sup>4</sup> The answers of the Respondents admitted, with few minor exceptions, the allegations of the complaint which alleged the facts relied on by the Board in the Representation case to support its conclusion. The answers aver that the part of the mail which is received by the Safe Deposit Co. through the mailing division of the Bank is the result of the clerical error of postal authorities and that it is not the result of arrangement made therefor. The answers denied that outgoing mail has been handled exclusively by the mailing division of the Bank, but the Respondents stipulated that part of the outgoing mail was so handled.

<sup>5</sup> *N. L. R. B. v. Federal Engineering Company, Inc., et al.*, 153 F. (2d) 233 (C. C. A. 6) enforcing as modified, 60 N. L. R. B. 592. See also *Matter of Graham Mill & Elevator Co.*, 40 N. L. R. B. 1289, *Matter of Turner Transportation Co.*, 60 N. L. R. B. 87. And see *Matter of Bankers Trust Company and Bankers Safe Deposit Company*, 56 N. L. R. B. 1071.

and the vault attendants employed by respondent Safe Deposit Company, but excluding managers, chiefs, assistant chiefs, supervisory and clerical employees, and George A. Freibert, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act."

The Respondents contend that this unit is inappropriate (a) because the Safe Deposit Co. is not engaged in commerce within the meaning of the Act, and (b) because the Board, in setting up such a unit, acted arbitrarily and capriciously. The first ground is disposed of by the conclusions hereinbefore reached.<sup>6</sup>

In support of the contention that the Board acted arbitrarily and capriciously, the Respondents in their brief to the Trial Examiner point to certain factors which, in other cases, the Board has considered relevant in finding certain units to be inappropriate. It seldom happens that all factors which must be considered by the Board when it is determining an appropriate unit will either be all favorable or all unfavorable to the appropriateness of the unit. The Board must, therefore, weigh the factors in favor of appropriateness against those which are unfavorable. This was done by the Board in the Representation case here involved. The undersigned finds no evidence that in balancing these factors and finding the unit to be appropriate the Board acted arbitrarily or capriciously.

Evidence of change of circumstances since the Representation hearing was insubstantial. Such changes as appeared would not have made any material difference in the factors already considered by the Board in its determination of the appropriate unit.

In view of the foregoing, the undersigned finds that the unit above described at all times material herein was and now is appropriate for the purpose 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

On July 10, 1943, pursuant to the Board's Decision and Direction of Election in the Representation case here involved, an election was conducted among the employees in the unit found appropriate. In that election a majority of the employees chose the Union as exclusive bargaining representative.<sup>7</sup> Thereafter, on July 26, 1943, the Board certified the Union as the exclusive representative of all the employees in the appropriate unit.

The Respondents contend that since the date of such certification the Union has lost its majority. Where a certified union has not had a reasonable time or opportunity in which to bargain, the Board, in order to effectuate the purposes of the Act, may consider that such union's bargaining status is not affected by a loss of majority.<sup>8</sup> And where a loss of majority follows the commission of an unfair labor practice, an employer may not rely upon such loss of majority, since the loss may reasonably be attributed thereto<sup>9</sup>

<sup>6</sup> In the section entitled, "I. The business of the Respondents."

<sup>7</sup> The tally of ballots shows that of 42 eligible voters 23 voted for, and 17 against, the Union

<sup>8</sup> *Matter of Allis-Chalmers Manufacturing Company*, 50 N. L. R. B. 306; *Matter of American-Marsh Pumps, Inc.*, 59 N. L. R. B. 1084; *Matter of Galke Corp.*, 69 N. L. R. B. 333.

<sup>9</sup> *Franks Bros Co v N. L. R. B.*, 321 U. S. 702; *International Association of Machinists v N. L. R. B.*, 311 U. S. 72; *Oughton v N. L. R. B.*, 118 F. (2d) 494 (C. C. A. 3), cert. den., 315 U. S. 797; *Matter of Cheney California Lumber Company*, 62 N. L. R. B. 1208, enf'd in 154 F. (2d) 112 (C. C. A. 9); *Matter of Karp Metal Products Co, Inc.*, 51 N. L. R. B. 621; *Matter of Wilson & Co., Inc.*, 67 N. L. R. B. 662; *Matter of Sema-Steel Casting Co.*, 66 N. L. R. B. 713; *Matter of Pacific Plaster & Mfg Co., Inc.*, 68 N. L. R. B. 52; *Matter of Jones & Laughlin Steel Corporation*, 72 N. L. R. B. 975.

This is not to say that a presumption of majority would continue indefinitely even after a refusal to bargain, but for purposes of practical administration of the Act and in order to effectuate the policies of the Act, the presumption will be indulged in where there is a refusal to bargain unless and until supervening circumstances are such as to overcome the force of the presumption or to make the reasons for the presumption no longer applicable.<sup>10</sup> For the reasons set forth below in the Section entitled "The remedy," the undersigned finds that in the circumstances of this case, the presumption fails.

Accordingly, the undersigned finds that on July 10, 1943, the date of the election, and for a reasonable period thereafter, which, under the circumstances here, the undersigned finds would not have extended to the date on which the charge was filed, the Union was the duly designated representative of a majority of the employees in the aforesaid appropriate unit, and that by virtue of Section 9 (a) of the Act, the Union was at all such times the representative of all the Respondents' employees in the above-described unit for the purpose of collective bargaining.

### 3 The refusal to bargain

#### (a) History

Following its certification by the Board on July 26, 1943, the Union on July 30 wrote to the Respondents requesting a bargaining conference. On August 9 the Respondents wrote separate but identical letters refusing to bargain on the ground that the Board was in error both in taking jurisdiction and in combining into one unit the employees of both Respondents. Their letters concluded that they were taking steps to secure a review of the Board's action.

Following such refusal to bargain, the Union requested the United States Conciliation Service to conciliate the dispute, and after conciliation failed, the dispute was, on about September 15, 1943, certified to the War Labor Board. The issues stated to be involved before the War Labor Board were, according to a letter, dated September 25, 1943, from the Disputes Division of the Regional War Labor Board to the Bank, "Initial contract proposal, Union recognition." From the outset, the Respondents took the position that the War Labor Board was not the proper tribunal to give the relief sought.

During the period between the summer of 1943 and the summer of 1945, protracted proceedings were engaged in before the War Labor Board with no apparent final disposition.<sup>11</sup>

<sup>10</sup> See *Matter of Bethlehem Steel Company*, 73 N. L. R. B. 277.

<sup>11</sup> A directive order of the R. W. L. B. dated February 18, 1944, requiring the Bank (The Safe Deposit Company was not specifically named as a party) to enter into negotiations with the Union, was modified by the National War Labor Board on April 27, 1944, in a directive order which "recommended" that the parties "endeavor to settle by negotiation all outstanding issues" and directed that if they failed to reach agreement by July 18, 1944, a hearing was to be held before a panel.

After a further request by the Union for bargaining on June 7, 1944, rejected on June 20, 1944, a hearing was held before a tripartite panel of the W. L. B. on October 23, 1944. Among other things, the Respondents there relied upon a loss of majority by the Union, which issue was referred to the N. W. L. B.

The panel on November 24, 1944, made recommendations, and on January 22, 1945, the N. W. L. B. issued a Supplementary Directive Order ordering certain contract terms to govern the relations between the parties and referring the issues of wages to a tripartite panel. The Bank on February 26, 1945, petitioned the N. W. L. B. for recon-

On November 22, 1943, the Respondents filed in the Federal District Court a complaint asking for a declaratory judgment of the rights of the Respondents, the Union, and 20 named employees of the Bank within the unit, for a nullification of the Board's certification of the Union, and for permanent, preliminary, and temporary injunctions against the Regional War Labor Board. The 20 employees, designated "Independent Protection Employees," filed a counterclaim and cross-claim for declaratory judgment and for nullification of the Board's certification. On November 6, 1944, pursuant to stipulation, the action was dismissed as to the Regional War Labor Board. On motion of the Union, the complaint, counterclaim, and cross-claim were dismissed by the District Court on November 29, 1944. The Respondents and 20 named employees appealed to the Circuit Court of Appeals. This appeal was dismissed on motion of the Respondents on November 7, 1945.<sup>12</sup>

Throughout this time the Respondents took the position that they would not bargain with the Union. They claimed a right to test the Board's jurisdiction and determination of the unit in court and claimed that the War Labor Board could not compel them to bargain but could only fix the terms of a contract between the Respondents and the Union.

#### (b) The unilateral wage increases

The complaint alleges, and the answers admit, that on March 31, 1944, the Safe Deposit Co. unilaterally made application to the War Labor Board for approval of increases in the salary ranges of employees in the unit and that since July 26, 1943, the Respondents have failed and refused to bargain in that both unilaterally granted salary increases to employees in the unit. The

sideration of the Supplementary Directive Order. On April 20, 1945, the N W L B denied the petition with one exception not material here.

A hearing before a tripartite panel on wages was held on May 28, 1945. At the hearing, the attorney for the Bank stated that it would not comply with the N W L B order of January 22, 1945, and would not voluntarily furnish wage data. On July 2, 1945, the R W L B directed the Bank to show cause on July 6 why the said directive order should not be complied with. A hearing was held on the latter date and on July 17, 1945, the Compliance Section of the Regional W L B gave notice to the parties that the R W L B had found the Bank in non-compliance and was referring the case back to the N W L B for whatever action it deemed necessary.

On the same date, July 17, 1945, over signature of "Industry Members by A C Barrett," the N W L B wrote to the Bank stating that their records indicated that the case was officially closed and asking if there was any need for them to retain their file on the case. It does not appear that the Union received such a letter or was given any notice that the case was closed. In an undated letter from the Assistant Director of Disputes of the R W L B to the Bank's attorney (received by the latter on July 25, 1945) the former stated that on July 16, 1945, the N W L B referred the case file to the R W L B with instructions that it take action on the issues of non-compliance. The letter is ambiguous in stating that the R W L B had decided to refer the matter to the N W L B but without disclosing whether this referred to action by the R W L B on the July 6 show-cause hearing or after a remand on July 16 for compliance. The latter may be inferred from the closing sentence that a copy of the record "is to be submitted [to the N. W. L. B.] with the file." The letter indicated that a copy was sent to the Union's attorney. There is no record of any further action by the War Labor Board.

<sup>12</sup> Twenty employees of the Bank (but not of the Safe Deposit Co.), presumably the same as those involved in the above litigation, unsuccessfully prosecuted a suit against the Board in the District Court for the District of Columbia for a mandatory injunction requiring the Board to expunge its decision and direction of election and to vacate and set aside the certification of the Union. *Reilly et al v Millis et al*, 52 F Supp 172 (Oct. 4, 1943), 144 F (2d) 259 (July 10, 1944) cert den 325 U S 879 (June 18, 1945).

evidence indicates that such increases were granted by the Bank to its employees in the unit after July 26, 1943, in each year from 1943 to 1946 inclusive. The Safe Deposit Co granted increases in 1943, 1945, and 1946.

In the first half of October 1944, Lester McMahon, vice president of the Bank and treasurer and director of the Safe Deposit Co., addressed the employees of the Safe Deposit Co. informing them of the application that had been made for salary increases to the War Labor Board and telling them that, despite the Safe Deposit Co.'s assurance to the WLB that approval of the application and action taken pursuant thereto would be considered as having no bearing on the ultimate outcome of the matter before the Disputes Division of the W. L. B., a representative of the W. L. B. had stated that no action would be taken until the matter of union representation had been decided. No explanation was given to show how the Bank was able to increase the salaries of its employees in the unit in 1944 when the Safe Deposit Co. was unable to do so because of its inability unilaterally to get approval of the W. L. B.

### (c) Conclusions

The foregoing facts clearly establish a refusal to bargain on and after August 9, 1943, in violation of Section 8 (5) of the Act and the undersigned so finds. The complaint does not treat the wage increases as violations of Section 8 (1) of the Act except as an incident of the refusal to bargain. The increases were given to employees in the unit along with employees generally in conformity with a practice of giving consideration to increases, promotions, and other recommendations of division managers semi-annually from the date of employment.

Whether or not the increases were merely an incident to the refusal to bargain, the granting of them without negotiation with the bargaining agent and the unilateral application to the War Labor Board by the Safe Deposit Co. interfered with, restrained, and coerced the employees in the exercise of the rights guaranteed in Section 7 of the Act.<sup>13</sup> "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."<sup>14</sup> Consequently it constitutes a violation of Section 8 (1) of the Act.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents set forth in Section III, above, occurring in connection with the operations of the Respondents 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

The undersigned has found that the Respondents have committed unfair labor practices in refusing to bargain with the Union and in granting unilateral salary increases and making unilateral application to the War Labor Board for approval of salary increases of employees in the unit. It will therefore be recommended

<sup>13</sup> The undersigned excludes the 1946 increases herefrom because of the conclusion that the Union was not then presumed to be the majority representative.

<sup>14</sup> *May Department Stores Company v. N. L. R. B.*, 326 U. S. 376, at 385

that the Respondents cease and desist from such conduct and take certain affirmative action which the undersigned finds will effectuate the policies of the Act. The undersigned will further recommend that the Respondents cease and desist from any other acts in any manner interfering with the efforts of a certified or chosen representative of the majority of the Respondents' employees in an appropriate unit to negotiate a collective bargaining contract or to represent such employees as bargaining agent.<sup>15</sup>

No proof was offered by the Union or the Board that at the time of the hearing the Union still represented a majority of the employees in the appropriate unit. Such proof would not usually be required where an employer refuses to bargain with a certified union which has taken proper steps to enforce its rights<sup>16</sup> However, in this case, the Union wasted more than a reasonable length of time endeavoring to obtain from the War Labor Board a remedy which should have been sought from this Board. This conduct caused the Board in *Matter of Sears Roebuck and Co.*<sup>17</sup> to reject the contention of a certified union that the *Allis-Chalmers*<sup>18</sup> doctrine applied. The Board in the *Sears* case said:

In taking this position [that the ILWU had not had an opportunity since its 1943 certification to enjoy the fruits of collective bargaining] it seeks to invoke the doctrine of the *Allis-Chalmers* case. We are of the opinion, however, that the principle enunciated in that case is inapplicable to the facts set forth above. It is true that in certain circumstances we have afforded a measure of protection to a recently certified union involved in WLB proceedings by refusing to entertain a representation petition. [Citing *Matter of Kennecott Copper Corporation*, 51 N. L. R. B. 1140; *Matter of Aluminum Company of America*, 53 N. L. R. B. 593; *Matter of Taylor Forge & Pipe Works*, 58 N. L. R. B. 1375; *Matter of American-Marsh Pumps, Inc.*, 59 N. L. R. B. 1084; *Matter of Brown Shoe Company, Inc.*, 60 N. L. R. B. 620; *Matter of Aluminum Company of America*, 58 N. L. R. B. 24] But in those cases, the facts indicated that the labor organization had no remedy under the Act and was properly before the WLB; the basic conflict between the parties [in such cases] concerned the content of the substantive bargain. In the instant case, however, the facts unmistakably indicate that at all times the crucial issue between the ILWU and the Company was the ILWU's *right to recognition as the bargaining agent* of the employees here concerned. This question was one that should have been resolved by the ILWU's filing an unfair labor practice charge alleging that the Company had refused to bargain in violation of Section 8 (5) of the Act. The ILWU thus chose the wrong forum in which to test its rights.

This was no accident or minor error of judgment. The ILWU, ignoring the fact that the primary issue—the Company's alleged refusal to bargain collectively, rather than substantive differences—was one which Congress created the National Labor Relations Board to resolve; preferred to take its case to the WLB, presumably believing that a quicker remedy might be secured through that agency. But surely this Board's procedures, now a decade old, would not have been any less peaceable and orderly than those of the WLB. The *Allis-Chalmers* doctrine had the salutary objective of not penalizing a union which

<sup>15</sup> See *May Department Stores Co. v. N. L. R. B.*, 326 U. S. 376.

<sup>16</sup> *Matter of Bethlehem Steel Company*, 73 N. L. R. B. 277; *Matter of Allis-Chalmers Company*, 50 N. L. R. B. 306, *Matter of American-Marsh Pumps*, 62 N. L. R. B. 931.

<sup>17</sup> 65 N. L. R. B. 1039 at 1043.

<sup>18</sup> *Matter of Allis-Chalmers Company*, 50 N. L. R. B. 306

took a war-time dispute concerning conditions of employment to the WLB, rather than utilize its economic strength; it should not be extended to a situation where the only alternative to invoking the WLB's jurisdiction was not self-help, but the use of the statutory machinery of a more appropriate Government agency.

In the present case the Union was or should have been aware that it was not entitled to the relief sought from the War Labor Board as early as March 16, 1944.<sup>19</sup> Even after the show-cause hearing before the War Labor Board in July 1945, when Respondents' counsel called attention to the fact that the War Labor Board would not compel bargaining where an employer refused to bargain in order to obtain a court review of the validity of the certification, the Union took no steps to initiate proceedings before this Board to obtain an order to compel the Respondents to bargain until December 19, 1945.

Under all the circumstances the undersigned believes that it would not effectuate the policies of the Act to require the Respondents at this time to bargain with the Union and no recommendation will be made in regard thereto.

The Respondents urge the dismissal of the complaint because of laches on the part of the Union and the Board. No time limitation is imposed by statute on the proceedings before the Board, and mere lapse of time alone does not as a matter of law act as a bar.<sup>20</sup> Where it would not serve to effectuate the policies of the Act to direct that unfair labor practices be remedied because of great lapse of time, the Board may withhold some or all of the normal remedy. But this is not because the action, which is a public one, has ceased to exist; it is rather an exercise of discretion as to the remedy.

As a bar to these proceedings, therefore, the lapse of time is rejected as a defense. The undersigned has already indicated the extent to which he believes such lapse of time should affect the remedy.

#### CONCLUSIONS OF LAW

1. All members of the day police, night force, and deputies employed by the Respondent City National Bank and Trust Company of Chicago, and the vault attendants employed by the Respondent City National Safe Deposit Company, Chicago, Illinois, but excluding managers, chiefs, assistant chiefs, supervisory and clerical employees, and George A. Freibert, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

2. Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.), was on July 10, 1943, and for a reasonable period (not extending to the date of the filing of the charge by the Union), the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

3. By the Respondents' failure and refusal, on August 9, 1943, and at all subsequent times within a reasonable period following the date of the Union's certification, to bargain with Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.),

<sup>19</sup> See statement of policy publicized by W. L. B. on March 16, 1944 14 L R R M 2587-9

<sup>20</sup> *N. L. R. B. v. Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685; *N. L. R. B. v. Crowe Coal Co.*, 104 F. (2d) 633 (C. C. A. 8); *N. L. R. B. v. Thompson Products, Inc.*, 141 F. (2d) 794 (C. C. A. 9); *Matter of Jefferson Electric Co.*, 8 N. L. R. B. 284; *Matter of Brown Paper Mill Co., Inc.*, 36 N. L. R. B. 1220. *Matter of Standard Oil Co. of California*, 61 N. L. R. B. 1251

as the exclusive representative of their employees in the appropriate unit, by the Safe Deposit Co.'s making unilateral application for approval of salary increases of employees in the unit in 1944, and by the Respondents' granting to employees in the unit salary increases without consulting with the Union in 1943, 1944, and 1945, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

4. By interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

5. 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 foregoing findings of fact and conclusions of law and the entire record in the case, the undersigned recommends that the Respondents, City National Bank and Trust Company of Chicago and City National Safe Deposit Company, its wholly owned subsidiary, in Chicago, Illinois, their officers, agents, successors, and assigns shall, jointly and severally:

1. Cease and desist from:

(a) Refusing to bargain collectively with the certified or chosen representative of the majority of their employees in an appropriate unit;

(b) In any manner interfering with the efforts of a certified or chosen representative of the majority of their employees in an appropriate unit to negotiate a collective bargaining contract or to represent such employees as bargaining agent.

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

(a) Post in their premises at 208 South LaSalle Street, Chicago, Illinois, copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region (Chicago, Illinois), shall, after being duly signed by the Respondents' respective representatives, be posted by the Respondents immediately upon receipt thereof, and maintained by them in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Thirteenth Region (Chicago, Illinois), in writing, within ten (10) days from the date of the receipt of this Intermediate Report of what steps the Respondents have 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 Respondents notify the said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondents to take the action aforesaid.

As provided in Section 203.39 of the Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946, any party or counsel for the Board may, within fifteen (15) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.38 of said Rules and Regulations, file with the Board, Rochambeau Building, Washing-

ton 25, D. C., an original and four 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 four copies of a brief in support thereof; and any party or counsel for the Board may, within the same period, file an original and four copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203 65. As further provided in said Section 203 39, 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.

JAMES R. HEMINGWAY,  
*Trial Examiner.*

Dated May 9, 1947.

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 refuse to bargain collectively with the certified or chosen representative of the majority of our employees in an appropriate unit or in any manner interfere with the efforts of a certified or chosen representative of the majority of our employees in an appropriate unit to negotiate a collective bargaining contract or to represent such employees as collective bargaining agent.

OUR EMPLOYEES are free to become or remain members of PROTECTIVE SERVICE EMPLOYEES' UNION OF CHICAGO, LOCAL 240, affiliated with BUILDING SERVICE EMPLOYEES' INTERNATIONAL UNION (A. F. of L.), or any other labor organization.

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO,  
*Employer.*

By -----  
(Representative) (Title)

CITY NATIONAL SAFE DEPOSIT COMPANY,  
*Employer.*

By -----  
(Representative) (Title)

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.