In the Matter of UNDERWOOD MACHINERY COMPANY *and* INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (C. I. O.)

Case No. 1–C–2629

ORDER DENYING PETITION FOR RECONSIDERATION

June 25, 1948

On July 30, 1947, the Board issued its Decision and Order in the above-entitled proceeding.

Thereafter, the Respondent filed a Petition for Reconsideration of Decision and Order, requesting that the Board either:

(1) Modify or set aside certain parts of its findings of fact, conclusions of law, and order; or

(2) Withdraw its Decision and Order pending compliance by the Union with the filing provisions of Section 9 (f), (g), and (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, and dismiss the complaint if the Union should fail to comply.

With respect to the latter request, it appears that the Union is now in compliance. Furthermore, the Board has previously held that the filing requirements of Section 9 (f), (g), and (h) of the amended Act are not applicable to cases such as this, in which complaint issued before August 22, 1947, except in respects not now relevant.[1] We shall therefore deny this request.

With respect to its other request, the Respondent alleges, in substance:

(1) That the Board and its representatives improperly placed upon the Respondent the burden of proving its assertion that the Union's majority among the employees in the bargaining unit was coerced. The Respondent also alleges that the Trial Examiner failed to enforce a subpoena directed to Foreman Bowser, who allegedly engaged in pro-union activities, and, after failing to do so, treated Bowser's absence as a reflection on the Respondent's case. The objections thus raised are clearly untimely, in view of the fact that they were not urged by the Respondent in its exceptions.

[1] See *Matter of Marshall and Bruce Company*, 75 N. L R B 90

(2) That the Trial Examiner's findings, which the Board adopted, with respect to the lay-off of employee Skaanning and the discharge of employee Murphy are not supported by substantial evidence; and that the finding as to Skaanning is based, in part, upon hearsay testimony that the Respondent contends would be inadmissible under Section 10 (b) of the amended Act. The Board, however, has already considered the evidence with respect to Skaanning and Murphy in the light of the Trial Examiner's findings and the Respondent's exceptions. No new considerations are presented now to warrant reconsideration of our original Decision. Moreover, the Respondent's contention that hearsay testimony would be inadmissible under Section 10 (b) of the amended Act is irrelevant, as such testimony was admissible under the Act at the time of the Board's Decision. The procedural change effected by the subsequent amendments is not applicable to action taken before the effective date of the amendments.[2]

(3) That discrimination against Skaanning is disproved by an alleged offer of reinstatement on October 21, 1946. There is no evidence in the record that such an offer was made. But even if the Board should accept the Respondent's allegation as true, it is clear that an offer of reinstatement made 5 months after the issuance of the Intermediate Report, in which the Trial Examiner found the lay-off discriminatory, has no probative value with respect to the Respondent's motive in making the lay-off.

(4) That, in any event, the Respondent's liability for back pay in Skaanning's case should end on October 21, 1946, the date of the alleged offer of reinstatement. Although such an offer, if established, would be material in computing the amount of back pay to which Skaanning may be entitled, it does not require modification of the Board's Order at this time. It may be considered in determining whether the respondent has complied with the Order.

(5) That the Respondent should not be required to reinstate Murphy in view of the Board's finding that he would have been laid off on February 6, 1946, even if he had not previously been discharged. The Board has power, however, when it has found that an employer has engaged in unfair labor practices, to order such affirmative remedial action as it finds necessary to effectuate the purposes of the Act. The order to reinstate Murphy when work is available is necessary to accomplish this objective and is appropriate under the circumstances.

(6) That the Board has no authority to order reinstatement of Murphy, or to award him back pay, in view of the provision in Section

[2] See *N L R B* v. *Mylan-Sparta Co*, 166 F. (2d) 485 (C C A 6); *N L. R. B.* v. *National Garment Co*, 166 F (2d) 233 (C. C A 8), *N L R B* v. *Brozen*, 166 F. (2d) 12 (C. C A 2), *N L R B* v *Whittenburg*, 165 F. (2d) 102 (C. C A 5).

10 (c) of the amended Act, prohibiting such orders in the case of individuals suspended or discharged for cause. The Board, however, has already determined that Murphy was discharged discriminatorily and not for cause. The provision in Section 10 (c) upon which the Respondent relies is, therefore, inapplicable.

(7) That the Board should set aside or modify its conclusion that it had power to conduct an election without first designating the appropriate unit, its finding that Bowser's conduct did not have a probable effect on the election, and its finding that Griffin was not a supervisor. No reasons are stated in the petition for these requests, and we therefore find them without merit.

It therefore appears that no issues have been raised by the Respondent's petition which warrant the modification or setting aside of any part of the Board's Decision and Order, and the Respondent's request will accordingly be denied.

IT IS HEREBY ORDERED that the Respondent's Petition for Reconsideration be, and it hereby is, denied.

MEMBERS MURDOCK and GRAY took no part in the consideration of the above Order Denying Petition for Reconsideration.