that one or more of the other houses might also be struck. The lockout therefore clearly was intended to interfere with the concerted activity of the salesmen.

Summarizing, I find that:

1. Petitioners locked out their employees, and the severance from employment was temporary in character.

2. The purpose of the lockout was to interfere with and coerce the employees in the exercise of rights guaranteed under Section 7 of the Act and discriminate as to their hire and tenure of employment because of membership in the Union, and was not a legitimate exercise of Petitioners' economic remedies.

KANMAK MILLS, INC., KULPMONT MANUFACTURING COMPANY, INC. *and* TEXTILE WORKERS UNION OF AMERICA, CIO. *Case No. 4–CA–134. June 30, 1952*

Supplemental Decision and Recommendation

On February 28, 1951, the National Labor Relations Board issued a Decision and Order in this case,[1] in which it found that the Respondents had engaged in and were engaging in certain unfair labor practices affecting commerce, and ordered the Respondents to cease and desist therefrom and to take certain affirmative remedial action.

On September 1, 1951, the Board petitioned the United States Court of Appeals for the Third Circuit for enforcement of its Order against the Respondents, and on September 20, 1951, the Respondents filed their answer thereto, and also a motion to remand and affidavit in support thereof. In their motion, the Respondents alleged that, as Arthur Christopher served as co-counsel for the General Counsel during the trial of the case, and was at all times during the trial of the case and its decision by the Trial Examiner and the Board a legal assistant to the Chairman of the Board, Section 5 (c) of the Administrative Procedure Act,[2] herein called the APA, was violated. On October 26, 1951, the court remanded the case to the Board for the purpose of taking testimony and determining whether Arthur Christopher participated or advised both in functions of investigation or prosecution and in functions of decision in this case, contrary to the prohibition of Section 5 (c) of the APA.

Thereafter, on December 21, 1951, the Board ordered that the record in this case be reopened and a further hearing be held before a Trial Examiner for the purpose of taking testimony and making the determination directed by the court. Pursuant to this order of the Board, a hearing was held at Washington, D. C., on February 18, 1952, before George Bokat, a duly designated Trial Examiner.

[1] 93 NLRB 490.
[2] 5 U. S. C. 1004 (c).

On March 26, 1952, the Trial Examiner issued his Supplemental Intermediate Report, a copy of which is attached hereto, in which he found that Arthur Christopher did not participate or advise both in functions of investigation or prosecution and in functions of decision in this case, contrary to the prohibition of Section 5 (c) of the APA. Thereafter, the Respondents filed exceptions to the Supplemental Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Supplemental Intermediate Report, the exceptions and brief filed by the Respondents, and the entire record in the case, and hereby adopts the findings, conclusions,[3] and recommendation of the Trial Examiner.

Recommendation

Upon the basis of the above supplemental findings and conclusions and the entire record in this proceeding, the National Labor Relations Board hereby respectfully recommends to the United States Court of Appeals for the Third Circuit that the Board's Order of February 28, 1951, be enforced in its entirety.

CHAIRMAN HERZOG took no part in the consideration of the above Supplemental Decision and Recommendation.

Supplemental Intermediate Report

STATEMENT OF THE CASE

On September 1, 1951, the National Labor Relations Board, herein called the Board, petitioned the United States Court of Appeals for the Third Circuit for enforcement of its Decision and Order in the above-entitle matter against the Respondents, Kanmak Mills, Inc., and Kulpmont Manufacturing Company, Inc. On September 20, the Respondents petitioned the court to remand the case to

[3] In the section of the Supplemental Intermediate Report entitled "Conclusions," the Trial Examiner, in quoting from the Attorney General's Manual on the APA, inadverently refers to the first two paragraphs of the quotation as appearing on pp. 56–58, instead of p. 54, of the Manual Also, in the second paragraph of this quotation, a short part of the quoted material was inadvertently omitted, the second paragraph properly reads as follows:

> The phrase "factually related case" connotes a situation in which a party is faced with two different proceedings arising out of the same or a connected set of facts. For example, a particular investigation may result in the institution of a cease and desist proceeding against a party as well as a proceeding involving the revocation of his license The employees of the agency engaged in the investigation or prosecution of such a cease and desist proceedings would be precluded from rendering any assistance to the agency, not only in the decision of the cease and desist proceeding, but also in the decision of the revocation proceeding. However, they would not be prevented from assisting the agency in the decision of other cases (in which they had not engaged either as investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those which they had theretofore investigated or prosecuted.

These inadvertences affect neither the Trial Examiner's ultimate conclusions, nor our concurrence therewith.

the Board for the taking of additional testimony. In support of its petition the Respondents averred in substance: (1) That at the hearing before the Trial Examiner in this case an appearance was entered on behalf of the General Counsel by one Arthur Christopher; (2) that said "Christopher was active on behalf of the General Counsel in the conduct of the hearing and in the preparation thereof"; (3) that all times doing the trial of this case and the decision thereof, both by the Trial Examiner and the Board, Christopher "was and still is legal assistant or law clerk to Paul M. Herzog," Chairman of the Board; (4) that the action of the Board in permitting said Christopher to participate in the trial of this case in association with the General Counsel while at the same time acting as legal assistant or law clerk to the Chairman of the Board, which Board subsequently decided the case, is a violation of Section 5 (c) of the Administrative Procedure Act, herein called the APA;[1] and (5) that Christopher, in his capacity as legal assistant or law clerk to the Chairman of the Board, could not separate that duty from his duty as co-counsel for the General Counsel "and that the result of this duality of functions was in violation of the aforesaid Act."

On October 26, 1951, the United States Circuit Court remanded the case to the Board "for the purpose of taking testimony and determining whether Arthur Christopher participated or advised both in functions of investigation or prosecution and in functions of decision in this case contrary to the prohibition of Section 5 (c) of the Administrative Procedure Act." On December 21, 1951, the Board issued an order reopening the record in this proceeding and directing that a further hearing be held for the purpose of taking testimony as set forth in the remand.

Pursuant to notice, a hearing was held on February 18, 1952, at Washington, D. C., before George Bokat, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. All parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the remand, to argue the issues orally upon the record, and to file briefs, proposed findings of fact, and conclusions of law. The Respondents filed a brief with the undersigned.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT[2]

During the period here involved there were attached to the staff of each of the 5 Members of the Board, the decision-making body of the agency, from 15 to 18 legal assistants. The primary duties of a legal assistant are to digest and analyze the facts and the law in what are known as complaint and representation cases and to assist in the preparation of decisions thereon on behalf of the par-

[1] Section 5 (c) provides in part:

"No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to Section 8 except as witness or counsel in public proceedings."

[2] During the course of the hearing only two witnesses were called, Arthur Christopher and Ogden W. Fields, both by the General Counsel. A careful analysis of their testimony together with their demeanor while testifying leads me to the conclusion that they are completely trustworthy and reliable witnesses. The findings made herein are based primarily upon their credited testimony.

ticular Board Member for whom he works.[3] Complaint cases are adversary proceedings, subject to the APA, and involve alleged violations of the Taft-Hartley Act. Representation cases are nonadversary proceedings, not subject to the APA,[4] and involve the determination of collective bargaining representatives in appropriate bargaining units when a question concerning the representation of the employees involved is raised.

Under the Taft-Hartley Act, sole authority and responsibility for the investigation, issuance, and prosecution of complaint cases lies with the General Counsel.[5] Also, under an arrangement between the five-member Board and General Counsel, his field staff has authority to act as agents of the Board in the preliminary investigation of representation cases, to effect settlements or adjustments in such cases, and to conduct hearings on the issues involved. The five-member Board, however, makes decisions in all contested representation cases.[6]

Persuaded that a legal assistant could obtain valuable experience by a brief tour of duty in one of the Regional Offices, the Board came to an agreement with the General Counsel providing for such training. As a result, on December 8, 1949, George J. Bott, presently the General Counsel and then the Associate General Counsel of the Board, sent the following self-explanatory bulletin to each of the Regional Directors who head the Board's Regional Offices:[7]

> The Board and the General Counsel have agreed to institute a program of field training for Board Legal Assistants.
>
> This program, to begin immediately and to run to June 30, 1950, involves assignment of Board Legal Assistants for thirty to sixty day details in Regional Offices for purposes of becoming acquainted with grass root operations and procedures. In order to enable these staff members to achieve a well-rounded picture of Regional Office operations, they should be assigned to assist Field Examiners or Attorneys conducting varied types of investigations, elections, settlement negotiations and enforcement.

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[3] Section 4 (a) of the National Labor Relations Act provides in part:

> . . . The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts . . .

Section 101.12 of the Board's published Statements of Procedure provides in part:

> *Board decision and order*—(a) If any party files exceptions to the intermediate report, the Board, with the assistance of the legal assistants to each Board member who function in much the same manner as law clerks do for judges, reviews the entire record, including the trial examiner's report and recommendations, the exceptions thereto, the complete transcript of evidence and the exhibits, briefs, and arguments. The Board does not consult with members of the trial examining staff or with any agent of the general counsel in its deliberations. It then issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the trial examiner. . . .

[4] See Section 5 (6) of the APA.

[5] Section 3 (d) of the Act provides:

> (d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

[6] From the Board's Fourteenth Annual Report for the fiscal year ended June 30, 1949.

[7] The full text of the document is attached hereto as an Appendix.

They should also be permitted to sit as hearing officers in representation cases and to attend complaint case hearings.[8] Definite assignment schedules have not been prepared but each Regional Office will be notified in advance when assignments are made.

Pursuant to this training program, Arthur Christopher, a legal assistant to Chairman and Board Member Paul M. Herzog since August 1947, was detailed to the Philadelphia Regional Office for the period of May 1 to June 2, 1950. There, acting under the general supervision of the General Counsel, Christopher, in addition to other duties, assisted Board Attorney Howard Kowal in prosecuting the case against the Respondents herein in the original hearing before a staff Trial Examiner from May 15 to 18, 1950. Prior to the hearing Christopher did not participate in any respect with its investigation or preparation for trial. At the hearing a formal appearance was noted for him, and while Christopher did not examine any of the witnesses he did confer with Kowal in regard to various trial problems and made suggestions as to questions to be asked witnesses as well as suggesting an amendment to the complaint. Christopher's further participation in the prosecution of the case ceased after the close of the hearing. He returned to Washington on June 2, where he resumed, and has continued since, his duties as legal assistant to Chairman Herzog.

During the summer of 1950 Christopher called the office of the Chief Trial Examiner to ascertain the date of the issuance of the Intermediate Report in the first hearing herein but was informed that it had not yet issued. It did issue on September 28, 1950, and shortly thereafter Christopher called the office of the Executive Secretary of the Board.[9] "I stated to the girl over the telephone that I was co-counsel in the Kanmak case and that I was calling because it seemed to me it might be embarrassing if the case were assigned to Chairman Herzog for his consideration, inasmuch as I was a member of Chairman Herzog's staff," testified Christopher. The girl replied that the case had already been assigned to Board Member John M. Houston.[10]

Until the issuance of the Board's Decision and Order herein on February 28, 1950, and other than calling the Chief Trial Examiner's office and the Executive Secretary's office as found above, Christopher did not discuss this case with

[8] Fields, Associate Executive Secretary of the Board, participated with others in the formulation of the training program for legal assistants It was not contemplated by the use of the words "attend complaint case hearings," Fields testified, that legal assistants were to be prohibited from assisting in the prosecution of a complaint case.

[9] The Executive Secretary functions as the administrative and management agent of the Board with responsibility for the docketing and assignment of cases, scheduling matters for consideration by the Board Members, and performing myriad other duties concerned with the processing of complaint and representation cases at the Board level.

[10] Upon issuance of an Intermediate Report the case is transferred to the Board and is filed chronologically with other cases previously transferred to the Board. Normally, when its turn is reached and exceptions to the Intermediate Report have been filed it is assigned to the next Board Member who indicates he has a legal assistant free to work on it. The great majority of Board decisions are rendered by panels of the Board rather than by the full Board. The Board has created five panels, each consisting of three members and each Board Member serving on three panels. For example, the case at bar was decided by a panel consisting of Board Members Houston, Murdock, and Styles Chairman Herzog did not participate in the decision However, it should be made clear that each nonparticipating Board Member receives a tentative draft of the decision that a particular panel has decided to issue Chairman Herzog therefore received a tentative draft of the Decision and Order issued in this case Any nonparticipating as well as participating Board Member can cause any case to be referred to the full Board for decision

anyone.[11] Nor did Christopher see the tentative draft of the Decision and Order in this case a copy of which, as indicated above, was sent to Chairman Herzog.

Conclusions

It is clear from its legislative history that one of the administrative evils the APA sought to minimize was the commingling of functions of investigation and prosecution with the function of decision. One who has tried to win for one side should not participate in judging. An issue that may be within the scope of the remand is whether the APA requires that utterly complete separation of functions urged by the Respondents. For example, the Respondents contend that the training program for legal assistants:

> . . . in its conception, design and effect flies in the very teeth of the Administrative Procedure Act. . . . It is clearly established by the record that legal assistants to Board members participate in all the judicial functions of the Board. To assign those persons to investigatory duties. . . . in complaint cases is in direct contradiction in not only the terms but the entire spirit of Section 5(c) of the Administrative Procedure Act, the obvious aim of which is to separate as much as possible the investigation and prosecution functions from those pertaining to the making of decisions. . . . It must be remembered that this program was not set up for the sole benefit of training Mr. Christopher, but was set up to train some 60 legal assistants of the Board.
>
> It is the Respondents' position that since Christopher admittedly participated and advised in the prosecution of the instant case and was legal assistant to Chairman Herzog, who under the facts must be taken to have participated or advised in the decision of the instant case, a violation of Section 5 (c) *ipso facto* has occurred. . . . It is submitted that since every member of the Board has been shown to participate in every case decided by the Board, a violation of Section 5 (c) takes place on every occasion that a legal assistant of any Board member takes part in the investigation or prosecution of a case later coming before the Board.

The Respondents therefore strongly urge, regardless of whether Christopher actually participated or advised in the Board's decision in this case, that from the otherwise admitted facts indicated above the APA has been violated. It may well be that this contention goes beyond the scope of the remand and that it is therefore unnecessary to consider. However, I have decided to treat with this contention since it is possibly encompassed within the terms of the remand. But before discussing this larger issue I will state my conclusions on the narrower one. It is apparent that while Christopher did not participate or advise in the function of investigation he did participate or advise in the function of prosecution. It is also clear, since I have completely credited Christopher's testimony, that he did not in fact participate in any way in the function of decision.

[11] Christopher testified that while he had not received any specific instructions concerning nonparticipation in the decision-making process where he had engaged in prosecution he "had knowledge of the general requirement," and did have Section 5 (c) of the APA in mind when he called the Executive Secretary's office. Fields testified that "It was realized that there would be no conflict under our procedure" with Section 5 (c) "because, while the legal assistant was in the field, he would be detailed to the office of the General Counsel, to the Regional Director's office, and obviously, when he returned to Washington, he would not participate in any case before the Board with which he was associated at the time he was in the field."

Now to get back to the Respondents' more basic contention. In *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, the Supreme Court, in holding that deportation hearings conducted before the Immigration Service are covered by the APA, found under the facts there disclosed, that Section 5 was violated primarily on the ground that the hearing examiner, termed the presiding immigrant inspector, had mixed prosecutive and hearing functions.[12] I find the *Wong Yang Sung* case distinguishable from the case at bar. I refer to the language of the Court:

> The Administrative Procedure Act did not go so far as to require a complete separation of investigative and prosecutive functions. But that the safeguards it did set up were intended to ameliorate the evils from the commingling of functions as exemplified here is beyond doubt.

Based upon my study of the APA and its legislative history I have reached a conclusion contrary to that urged by the Respondents. And though not technically within the purview of the remand, in reaching this conclusion I have not lost sight of the fact that while the APA sought to prevent the contamination of judging with inconsistent functions by providing for an internal separation of those functions, the National Labor Relations Act sought a more complete separation for the functioning of the Board as exemplified by a reading of Sections 3 (d) and 4 of that Act set forth above.

Respondents seek to apply the same restrictions to legal assistants that the APA has applied only to hearing examiners, a class of employees deliberately exalted by that Act. Section 11 provides:

> . . . there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to Sections 7 and 8, who shall be assigned to cases in rotation so far as practicable *and shall perform no duties inconsistent* with their duties and responsibilities as hearing examiners. . . . (Emphasis supplied.)

It is my belief that Congress did not intend to impose the same limitation as to duties to be performed on all other employees of administrative agencies. The *Wong Yang Sung* case cited above, pertained to the function of hearing examiners, who, under the facts of that case and as part of their regular duties, continuously interchanged the functions of investigation and judging and commingled the functions of prosecution and decision.

The language of the third sentence of Section 5 (c) seems clear and unambiguous:

> No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency, *shall, in that or a factually related case*, participate or advise in the decision, recommended decision, or agency review. . . . [Emphasis supplied.][13]

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[12] The Court, after surveying the whole history of the development of the APA, emphasized that the two principal purposes of that Act were to introduce greater uniformity of procedure and "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."

[13] The House Report on Section 5 (c), Senate Document No. 248, 79th Cong. 2d Session 262 (1946) said:

> The purpose of the section is to assure that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers, except as a participant in public proceedings, and even then in no different fashion than the private parties or their representatives.

According to the Attorney General's Manual on the APA, 1947, pp. 56–58:

> The limitation of the prohibition against consultation to those who performed investigative or prosecuting functions "in that or a factually related case," should be construed literally. As this provision originally appeared in H. R. 1203, 79th Cong. 1st sess. (1945) it was a complete prohibition against consultation with investigative and prosecuting personnel, as follows: "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency shall participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings." See Sen. Doc. p. 157.
>
> The phrase "factually related case" connotes a situation in which a party is faced with two different proceedings arising out of the same or a connected set of facts. For example, a particular investigation may result in the institution of a cease and desist proceeding against a party as well as a proceeding involving the revocation of his license. The employees of the agency engaged in the investigation or prosecution of such a cease and desist proceeding would be precluded from rendering any assistance to the agency, not only in the decision of the cease and desist proceeding, but also in the decision of other cases (in which they had not engaged either as investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those which they had theretofore investigated or prosecuted.
>
> * * * * * * *
>
> Section 5 (c) does not purport to isolate the agency heads from their staffs. Rather, in the interest of fair procedure, it merely excludes from any such participation in the decision of a case those employees of the agency who have had such previous participation in the adversary capacity in that or a factually related case that they may be "disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions." Final Report, [Attorney General's Committee on Administrative Procedure, p. 56, "It is clear that when a controversy reaches the stage of hearing and formal adjudication the persons who did the actual work of investigating and building up the case should play no part in the decision."]
>
> An agency officer or employee may not participate or advise in the decision, recommended decision, or agency review of an examiner's initial decision if in that or a factually related case he performed investigative or prosecuting functions. For example, if the agency's general counsel or chief accountant engages in the performance of investigative or prosecuting functions in a case, he becomes unavailable to the agency for consultation on the decision of that or a factually related case. Of course, he could always present his views as witness or counsel in the public proceedings, including the filing of briefs.

Carrying out the statutory scheme in accordance with Section 4 of the National Labor Relations Act, each Board Member has appointed a number of legal assistants to aid them in their judicial functions. By its Statements of Procedure the Board has also published its organizational division of the separation of functions in the light of both the APA and the Taft-Hartley Act. There is nothing in either Act prohibiting the occasional transfer or detailing of employees from the Board to the General Counsel or vice versa provided only that the Board or its assistants may not consult or advise with such employees who, in a particular case, have in fact performed investigative or prosecutive functions

in that or a factually related case. Nor are we here confronted with a situation where there has been a continuous interchange of functions of investigation, prosecution, and judging by the same person or class of employees, or by an employee who one day is an investigator or prosecutor and the next day the judge. The facts herein disclose that Christopher became a legal assistant to Chairman Herzog in August 1947 and from that date to February 18, 1952, when Christopher testified in this proceeding, he has, except for the period from May 1 to June 2, 1950, continuously performed the function of a legal assistant.

The Board, by detailing its legal assistants to the Regional Offices for a brief learning period, believed they would become better informed and more useful Government employees. And as long as the separation-of-functions requirement of the law has been maintained it appears to have been permissible, particularly since the Respondents have not shown to have suffered any legal prejudice from the operation of this training program. The usual presumption of regularity which attends administrative action taken pursuant to statutory authorization has not been overcome by the Respondents.[14] I find that the underlying congressional objective of providing a proper internal separation to have been carried out by the Board in a way consistent with both fairness and efficiency.

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

CONCLUSION OF LAW

Arthur Christopher did not participate or advise both in functions of investigation or prosecution and in functions of decision in this case contrary to the prohibition of Section 5 (c) of the Administrative Procedure Act.

[Recommendations omitted from publication in this volume.]

Appendix

Bulletin No. 69 DECEMBER 8, 1949.
To: All Regional Directors and Officers-in-Charge.
From: George J. Bott, Associate General Counsel.
Subject: Training Program for Board Legal Assistants.

The Board and the General Counsel have agreed to institute a program of field training for Board Legal Assistants.

This program, to begin immediately and to run to June 30, 1950, involves assignment of Board Legal Assistants for thirty to sixty day details in Regional Offices for purposes of becoming acquainted with grass root operations and procedures. In order to enable these staff members to achieve a well-rounded picture of Regional Office operations, they should be assigned to assist Field Examiners or Attorneys conducting varied types of investigations, elections, settlement negotiations, and enforcement. They should also be permitted to sit as hearing officers in representation cases and to attend complaint case hearings. Definite assignment schedules have not been prepared but each Regional Office will be notified in advance when assignments are made.

The travel and per diem expenses of Legal Assistants will be charged to a special project as defined in Memorandum M–274 from Carroll Shaw dated October 29, 1948. The title of the project will be Legal Assistants Training

[14] See *N L R. B.* v. *Greensboro Coca Cola Co.*, 180 F. 2d 840, 844–845 (C. A 4), and cases cited therein.

Program, "LATP" for short. All obligation documents and vouchers prepared for Legal Assistants should be marked with this identification in order that the Regional Office allotment account will not be charged, and also to enable the Fiscal Section to figure the cost of the training program. Inasmuch as the details of this program are being controlled from Washington, the additional information called for in Section II–E–5 of Memorandum M–274 need not be furnished.

G. J. B.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCALS 17, 17A, AND 17B, AND FRANCIS CUFFE, INDIVIDUALLY AND AS BUSINESS AGENT FOR THE SAID LOCALS *and* EMPIRE STATE PAINTING AND WATERPROOFING CO. INC. *Case No. 3–CD–6. June 30, 1952*

Decision and Determination of Dispute

STATEMENT OF THE CASE

This proceeding arises under Section 10 (k) of the Act, which provides that "whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen. . . ."

On January 10, 1952, Empire State Painting and Waterproofing Co. Inc., filed with the Regional Director for the Third Region a charge against International Union of Operating Engineers, Locals 17, 17A, and 17B, herein jointly called Operating Engineers, and Francis Cuffe, individually and as business agent for said Locals, alleging that they had engaged in unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act.

Thereafter, pursuant to Section 10 (k) of the Act and Sections 102.74 and 102.75 of the Board's Rules and Regulations, the Regional Director investigated the charge and provided for a hearing upon due notice to all parties. The hearing was held before William Naimark, hearing officer, on May 26, 1952. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[1]

[1] International Hod Carriers, Building and Common Laborers' Union of America, A. F. L., Local 210, and District Council No. 4 of Buffalo and Vicinity, Brotherhood of Painters, Decorators, and Paperhangers of America, A F. L. were served with notice of hearing but did not enter an appearance or intervene.