## P. A. MUELLER AND SONS, INC. *and* DISTRICT NO. 48, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL. Case No. 13-CA-1201. June 12, 1953

### DECISION AND ORDER

On April 8, 1953, Trial Examiner A. Bruce Hunt issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board[1] has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications[2] and additions:

We agree with the Trial Examiner that the Respondent refused to bargain with the Union on and after July 21, 1952, in violation of Section 8 (a) (5) of the Act.

As found in the Intermediate Report, the Respondent and Union executed a consent-election agreement providing for an election which was held on June 4, 1952.[3] The tally of ballots showed that 26 employees cast valid ballots, of which 12 were for, and 10 against, the Union. In addition, there were 4 challenged ballots, only 2 of which are in issue here and are dispositive. The 2 were cast by Clarence and Arnold Mueller, a son and nephew, respectively, of the Respondent's president

[1] 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 [Members Houston, Styles, and Peterson].

[2] Like the Trial Examiner, we find that the Respondent, in view of its sales-and-service agreements with International Harvester Company, operates as an integral part of a multistate enterprise; that its operations affect commerce within the meaning of the Act; and that it will effectuate the policies of the Act to assert jurisdiction in this case. N. L. R. B. v. Hallam & Boggs Truck and Implement Company, 198 F. 2d 751 (C. A. 10), enforcing 95 NLRB 1443. With due respect for the opinion of the Court of Appeals for the Sixth Circuit in N. L. R. B. v. Bill Daniels, Inc. et al., 202 F. 2d 579, relied on by the Respondent, we are disposed, in making this finding, to adhere to the Board's original determination in the Daniels case until the Supreme Court of the United States has passed on the question, particularly in view of contrary opinions by other courts of appeals in other cases such as N. L. R. B. v. Howell Chevrolet Company, 204 F. 2d 79 (C. A. 9), enforcing 95 NLRB 410, and N. L. R. B. v. Ken Rose Motors, Inc., 193 F. 2d 769 (C. A. 1), enforcing 94 NLRB 868.

Unlike the Trial Examiner, however, we make no findings as to whether or not the agreements under which the Respondent distributes Zenith, Philco, and other products also subject the Respondent to the Board's jurisdiction.

[3] The consent-election agreement also provided in part that "Such election shall be held in accordance with the . . . customary procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election "

and owner, P. A. Mueller. The Regional Director, on July 1, sustained these challenges because of the family relationship and certified the Union as majority representative. Thereafter the Respondent refused to bargain with the Union. The Respondent contends that the Union's certification is invalid and is insufficient to establish the Union's majority status because the Regional Director was arbitrary and capricious, principally in sustaining the challenges in issue on the ground of family relationship. Like the Trial Examiner, we find no merit in these contentions.

With respect to Clarence Mueller alone, Section 2 (3) of the Act, which defines "employee," specifically excludes from the definition "any individual employed by his parent." Although Clarence Mueller is technically employed not by his father, but by the Respondent corporation of which his father is president and owner, we are of the opinion that this relationship suffices to preclude his being an "employee" within the meaning of the Act.[4]

With respect to both Clarence and Arnold Mueller, a son and nephew, respectively, of P. A. Mueller, the Regional Director properly found that both should be excluded from the unit and were ineligible to vote by reason of their relationship to Respondent's president and owner. The Board's policy of excluding such near relatives is based on Section 9 (b) of the Act, under which the Board must in every case determine the unit appropriate for bargaining purposes.[5] In making this determination, the Board long has excluded from the appropriate unit those employees who lack sufficient interests in common with the employees included in the unit.[6] The Board early decided in this connection that the familial bond between an employer and employee is in certain cases so close as to remove the near relative from the "community of interest" shared by the other employees.[7] The interests of such near relatives are identified not with their fellow-workers, but with management itself.[8]

The practice of excluding close relatives of management rests on a further practical ground. Pursuant to Section 9 (b), the Board must determine the bargaining unit that will "assure to employees the fullest freedom in exercising the rights guaranteed by this Act," including the right to organize among themselves and to bargain collectively without interference, restraint, or coercion. The inclusion of a close relative of the employer in a bargaining unit with the other

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[4] N. L. R. B. v. O. U. Hofmann & Sons, 147 F. 2d 679 (C. A. 3), enforcing 55 NLRB 683.

[5] Section 9 (b) provides in pertinent part that "The Board shall decide in each case . . ., in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining . . ."

[6] For cases in which the courts have approved the "community of interest" criterion, see, e. g., Packard Motor Car Co. v. N. L. R. B., 330 U. S. 485, 491; Pittsburgh Plate Glass Co. v. N. L. R. B., 313 U. S. 146, 164, affirming 113 F. 2d 698, 701 (C. A. 8), I. A. M. v. N. L. R. B., 110 F. 2d 29, 46 (C. A. D. C.), affirmed 311 U. S. 72.

[7] Louis Weinberg Associates, Inc., 13 NLRB 66; Jerry and Edythe Belanger, 32 NLRB 1276.

[8] See Stanislaus Implement & Hardware Company, 92 NLRB 897, 898.

employees in a particular plant may as effectively hinder the employees in organizing themselves and bargaining collectively as would the intrusion of any representative of management. In the eyes of the other employees, a son or nephew of the employer, although he may work with other workers, is intimately allied with management. Accordingly, the employees well may view with suspicion his membership in the bargaining unit, especially where, as here, the employing enterprise is small and closely held.[9]

The Board's interpretation of Section 9 (b) as granting it the discretion to exclude close relatives prevailed under the original Act. Congress did not in any respect alter this practice in the amended Act.

In the light of these considerations, the Board adheres to its prior determination that close relatives of management are not appropriately included in a unit of rank-and-file employees.[10] We find, therefore, as did the Trial Examiner, that the Regional Director in this case was neither arbitrary nor capricious in sustaining the challenges to the ballots cast by a son and nephew of the Respondent's president and owner, thereby excluding them from the collective-bargaining unit in conformity with the Board's policy and practice.[11]

## ORDER

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, P. A. Mueller and Sons, Inc., Hartford, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with District No. 48, International Association of Machinists, AFL, as the exclusive representative of all its employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other conditions of employment.

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[9] Cf. R & J Underwear Co., Inc , 101 NLRB 299.

[10] International Metal Products Company, 104 NLRB 831; see Ashland Body Works, 95 NLRB 1520, 1521 The court in N. L. R. B. v Sexton Welding Company, Inc , 203 F 2d 940 (C. A. 6), reversing 100 NLRB 344, held that the Board erred in excluding a nephew of the employer from a bargaining unit because the Board lacked the discretion to exclude any persons on the basis of family relationship, except those specifically excluded under Section 2 (3). With due deference to the Court of Appeals for the Sixth Circuit, we shall adhere to the Board's established practice until the Supreme Court of the United States has passed on the question

[11] The Respondent further contends that the only appropriate bargaining unit in this case is one confined to employees engaged in selling and servicing International Harvester products, if jurisdiction is asserted on the basis of its International Harvester agreements alone. We reject this contention as lacking merit, since the activities of all employees of the Respondent, it seems clear, constitute integral parts of its business Dunlap Chevrolet Company, 91 NLRB 1115; cf. Maloney-Chambers Lumber Co., 104 NLRB 503 and N. L. R B. v Tri-State Casualty Insurance Company, 188 F. 2d 50 (C. A 10), enforcing 83 NLRB 828

(b) In any other manner interfering with the efforts of District No. 48, International Association of Machinists, AFL, to negotiate for or represent the employees in the aforesaid unit as their exclusive bargaining agent.

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

(a) Upon request, bargain collectively with District No. 48, International Association of Machinists, AFL, as the exclusive representative of the employees in the aforesaid unit and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post in conspicuous places at its place of business in Hartford, Wisconsin, including all places where notices to employees are customarily posted, copies of the notice attached to the Intermediate Report as an appendix.[12] Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for at least sixty (60) consecutive days thereafter. 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 said Regional Director, in writing, within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

[12] This notice, however, shall be amended by substituting for the words, "The Recommendations of a Trial Examiner," in the caption thereof, the words "A Decision and Order " In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of a United States Court of Appeals, Enforcing an Order."

## Intermediate Report and Recommended Order

### STATEMENT OF THE CASE

Upon a charge duly filed, a complaint and notice of hearing were issued and served by the General Counsel, and an answer was filed by the above-named corporation. The complaint alleges in substance that on or about July 21, 1952, said corporation, herein called the Respondent, refused, and has since continued to refuse, to bargain collectively with the above-named labor organization, herein called the Union, as the exclusive representative of its employees in an appropriate unit, although a majority of said employees had designated the Union as their representative for such purposes, in violation of Section 8 (a) (1) and (5) of the National Labor Relations Act, 61 Stat. 136, herein called the Act. By agreement of the parties, no hearing was held in this proceeding. On January 26, 1953, they executed a stipulation waiving a hearing and providing that the record herein shall consist inter alia of the charge, the pleadings, and an agreed statement of the factual situation. Thereafter, the undersigned Trial Examiner was designated by the Chief Trial Examiner to prepare and issue an Intermediate Report pursuant to the stipulation of the parties. Briefs were received from the General Counsel and the Respondent, and have been considered.

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

## FINDINGS OF FACT

### I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Wisconsin corporation, has its principal office and place of business at Hartford, Wisconsin, where it is engaged in the retail sale and servicing of tractors and farm machinery; household appliances such as refrigerators, ranges, stoves, radios, and television sets; heating and plumbing equipment; wire and other items needed in home electrical installations; and other hardware items. During the year 1951, the Respondent purchased merchandise at a cost of approximately $498,000. The record does not disclose the extent, if any, that such merchandise was shipped to the Respondent directly or indirectly from points outside the State of Wisconsin. All sales by the Respondent were local.

The Respondent is a nonexclusive authorized dealer of such products as trucks, tractors, and farm machinery manufactured by International Harvester Company; radios, television sets, and home appliances manufactured by Zenith Radio Corporation, Philco Corporation, and Westinghouse Electric Corporation; and furnaces and heating equipment manufactured by Wisconsin Furnace Company. The parties are agreed that those manufacturers, as well as the local distributors through which the Respondent obtains certain of the products, are subject to the jurisdiction of the Board, but all such products are shipped to the Respondent from points within the State of Wisconsin. During the year 1951, the Respondent's purchases of such products were of the approximate following values: International Harvester products, $75,000; Zenith products, $37,000; Philco products, $36,000; Westinghouse products, $34,000; and Wisconsin Furnace products, $12,000.

The Respondent denies that it is subject to the Board's jurisdiction. It points out that the monetary volume of its purchases is below the jurisdictional standards fixed by the Board during October 1950 for both direct and indirect inflow, Federal Dairy Co., Inc., 91 NLRB 638; Dorn's House of Miracles, Inc., 91 NLRB 632, and that its sales are all local, Stanislaus Implement and Hardware Company, Limited, 91 NLRB 618. On the other hand, while the General Counsel does not dispute the above contentions, he asserts that the Respondent, by virtue of its sales-and-service agreements with International Harvester Company, operates as an integral part of a multistate enterprise. Baxter Bros., 91 NLRB 1480; Hallam & Boggs Truck and Implement Company, 92 NLRB 1339, 95 NLRB 1443, enfd. 198 F. 2d 751 (C. A. 10). The General Counsel makes a like assertion concerning the agreements under which the Respondent deals in Zenith, Philco, Westinghouse, and Wisconsin Furnace products, at an annual value of approximately $119,000 as set out above.

The sales-and-service agreements between the Respondent and International Harvester Company are of types considered by the Board in the Hallam & Boggs cases. In accord with the Decisions therein, I find that the agreements afford International Harvester Company a substantial degree of control over the manner in which the Respondent operates its business in distributing International Harvester products.[1] On the other hand, the agreements under which the Respondent distributes Zenith, Philco, Westinghouse, and Wisconsin Furnace products differ extensively from the International Harvester agreements in the pertinent aspects recited in the preceding footnote, and I do not believe that they afford the respective manufacturers, or their distributors, a substantial degree of control over the manner in which the Respondent operates its business in distributing the particular products. Consequently, the fact that approximately $119,000 of the Respondent's 1951 purchases were of such products, while a significant factor in deciding whether the Respondent is subject to the jurisdiction of the Board as distinguished from whether the Board will exercise its jurisdiction under policies announced during October 1950, does not itself warrant application of the Baxter Bros. and Hallam & Boggs doctrine.

The jurisdictional question here turns upon the Respondent's relations with International Harvester Company. I believe that the Hallam & Boggs cases are applicable and that jurisdiction should be asserted. Although the Respondent's purchases from International Harvester Company constitute only about 15 percent of its total purchases, i.e., $75,000 of $498,000, the former monetary figure is a substantial one, but neither it nor the proportion-

[1] As the Board said in the second Hallam & Boggs case:

> The dealer sales-and-service agreements, which are in the record by stipulation of the parties, show on their face control by International Harvester of such elements as price, inventories, the sufficiency of sales-and-service facilities, financial records, insurance coverage, and advertising

ate figure is determinative.[2] The controlling point is that the Respondent operates as an integral part of a multistate enterprise, International Harvester Company, by virtue of the latter's substantial degree of control over the Respondent's operations in distributing its products. It is not controlling that the Respondent does not have an exclusive sales territory for International Harvester products, as the second Hallam & Boggs case makes clear. Nor is it controlling that the merchandise is shipped to the Respondent from local points. Baxter Bros., supra. I find that the Respondent is engaged in commerce within the meaning of the Act and that jurisdiction should be asserted herein. Certain cases upon which the Respondent relies are discussed in the footnote.[3]

## II. THE LABOR ORGANIZATION INVOLVED

District No. 48, International Association of Machinists, AFL, is a labor organization admitting to membership employees of the Respondent.

## III. THE UNFAIR LABOR PRACTICES

### A. The issue

It is agreed that certain categories of employees constitute an appropriate bargaining unit. It is also agreed that the Respondent refused to bargain collectively with the Union. The issue is whether the Union was the duly designated representative of a majority of the employees in the unit.

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[2] I have not been referred to, nor have I found, a case decided since October 1950 in which the Board declined to assert jurisdiction over a retailer of International Harvester products. In the Stanislaus Implement case, supra, which was decided before the Baxter Bros and Hallam & Boggs cases, jurisdiction was based upon the employer's out-of-State shipments, and the Board specifically did not consider "the amount and character" of the employer's purchases, which included International Harvester products. In Hallam & Boggs, the employer's purchases of such products constituted about 50 percent of its total purchases, and in monetary value approximately doubled the amount of such purchases here. In Cooley Sons Co., 102 NLRB 59, the employer's purchases of such products constituted more than 80 percent of its total purchases, but the monetary value was not related In Drummond Implement Company, 102 NLRB 596, where the employer dealt in products other than those of International Harvester Company, the Board asserted jurisdiction primarily on the basis of the employer's total operations, but reaffirmed the Hallam & Boggs doctrine without relating or relying upon detailed figures concerning the one retail outlet directly involved. See also Holm Tractor & Equipment Company, 93 NLRB 222 I do not believe that the proportionate figure is determinative. To hold that it is might lead to the absurd result of asserting jurisdiction over the operations of one employer while declining to assert it in the instance of another employer who purchases and sells substantially larger quantities, measured by monetary value, of like products.

[3] McDowell Maytag, 100 NLRB 770, does not appear to have presented a situation in which the employer's business was subject to a substantial degree of control by the Maytag Company. It presented instead a situation more comparable to the Respondent's agreements for the distribution of Zenith, Philco, Westinghouse, and Wisconsin Furnace products, as the Respondent suggests in its brief. Pacific Dental Laboratory, 91 NLRB 1140, and Ben Franklin Stores, 94 NLRB 779, did not present situations in which the respective employer's business was an integral part of a multistate enterprise. A G. Schmidt Farm Equipment, 90 NLRB 2152, presented a small operation in which International Harvester Company was not said to have had any interest or control, and in any event was decided before the Board's October 1950 announcement of jurisdictional policies. N. L. R. B. v. Bill Daniels, Inc., et al, 202 F 2d 579 (C. A. 6), in which petition for rehearing was denied, March 17, 1953, 31 LRRM 2470, was decided by a court of appeals for a circuit other than that in which the Respondent is located It is in conflict with N. L. R. B. v Ken Rose Motors, Inc , 193 F 2d 769 (C. A. 1) and N. L. R. B v. Somerville Buick, 194 F 2d 56 (C. A 1), as the court itself said. It is also in conflict with N. L. R. B. v. Howell Chevrolet Company, 204 F 2d 79 (C A. 9), more recently decided.

## B. The refusal to bargain collectively

### 1. The appropriate unit

The complaint alleges, and I find, that all employees of the Respondent at its Hartford, Wisconsin, place of business, excluding salesmen, foremen, and office clerical employees 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. *The Union's majority status*

#### a. The facts

On April 24, 1952, the Union filed with the Thirteenth Regional Office of the Board a petition for certification of representatives. On May 15 the Respondent and the Union executed an "Agreement for Consent Election," providing that an election by secret ballot should be conducted by the Regional Director among the employees in the above-described unit. On May 19 the Regional Director approved the agreement. On June 4 the consent election was conducted by Field Examiner Pierce, who, immediately prior to the election, discussed with representatives of the Respondent and the Union the eligibility of employees to vote A list of employees had been submitted by the Respondent and certain changes were made in it, after which it was approved by the Union and the Respondent. The list contains the names of Clarence and Arnold Mueller, whose ballots were challenged as set out below. It does not appear, however, whether either of these persons was specifically mentioned in the discussion.

Promptly after the election, Field Examiner Pierce delivered to the Respondent and the Union copies of a "Tally of Ballots" which recited that 26 employees had cast ballots, of which 4 had been challenged, that 12 employees had voted in favor of, and 10 against, representation by the Union, and that the challenged ballots were therefore sufficient in number to affect the outcome of the election.

Two of the four challenges had been made by Pierce, and a like number by the Union. On June 23 the Union wrote to the Regional Director and withdrew its challenge to the ballot of Edward Schnorenberg because it had been made "through error." On July 1 the Regional Director, after investigating objections to the conduct of the election and the challenges, issued a "Report on Objections and Challenges and Certification of Representatives" in which he sustained the three remaining challenges, one of which is not in issue as set out in the footnote.[4] He declined to rule upon the challenge to the ballot of Schnorenberg, although the challenge had been withdrawn, because the ballot could not affect the result of the election, and he found that the Union possessed majority status. Accordingly, he certified the Union as the exclusive representative of the employees in the appropriate unit.

Clarence and Arnold Mueller are a son and a nephew, respectively, of P. A. Mueller, the Respondent's president and owner. Their work is to deliver and install farm machinery. They are within the descriptive language of the appropriate unit. They are named on the list of eligible voters which was approved by the Respondent and the Union. The challenge to Clarence's ballot was made by the Union, and Arnold's ballot was challenged by Field Examiner Pierce. The challenges were sustained by the Regional Director because of the family relationship to P. A. Mueller.[5]

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[4] The objections to the conduct of the election, which had been filed by the Respondent on June 6, are not material here. The circumstances are that one of the challenged ballots was that of Jos. Gutschenritter, a supervisor, and the challenge was made by Field Examiner Pierce Gutschenritter's name had been deleted from the list of voters in the preelection discussion above mentioned. The Respondent's objections apparently were filed under the impression that a challenged ballot would be counted along with unchallenged ballots

[5] P. A. Mueller is identified in the Regional Director's "Report on Objections and Challenges . . ." as both the "owner" and president of the Respondent, and the parties stipulated that the "factual matters" recited in that document "shall be credited as true." In view of the corporate name, "P. A. Mueller and Sons, Inc ," one might infer that Clarence Mueller, a son, has a proprietary interest in the Respondent and for that reason should be excluded from the appropriate unit. I do not so infer. The question is whether the Regional Director was arbitrary or capricious in excluding him because of his relationship to P. A. Mueller.

b. Conclusions

Prefatory to an examination of the positions of the parties on the Regional Director's rulings, certain pertinent portions of the consent-election agreement and Board policies will be set forth. The agreement provides in part:

> 1. ELECTION.--Such election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.
> 6. OBJECTIONS, CHALLENGES, REPORTS THEREON.--...If the challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon. The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.

The Board's Rules and Regulations, Series 6, which were in effect at the time of execution of the consent-election agreement, as well as Series 6, as amended, which were in effect at the time of the election, both provide in Section 102.54 that in situations such as here ". . . the rulings and determinations by the regional director of the results thereof shall be final. . . ." They also provide in Section 102.61 that "Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election."

In Capitol Greyhound Lines, 49 NLRB 156, the Board held that in a situation such as here it would not disturb a Regional Director's determinations in the absence of a showing that they were arbitrary or capricious. The Board's holding received judicial approval. N. L. R. B. v. Capitol Greyhound Lines, 140 F. 2d 754 (C.A. 6), cert. den. 322 U. S. 763. In a later case, N. L. R. B. v. Carlton Wood Products Co., 201 F. 2d 863 (C.A. 9), enfg. 97 NLRB 1182, it was said that a Regional Director's determinations are not to be overturned unless "arbitrary or capricious, or not in conformity with the policies of the Board and the requirements of the Act." As we shall see, the determinations in this case were in conformity with the Board's policies.

As recited, the Union received 12 of 22 counted ballots, a majority. Of the 4 challenged ballots, the parties are agreed that the Regional Director properly sustained the one to the ballot of Gutschenritter. The Respondent contends, however, that the Regional Director was arbitrary or capricious in sustaining the challenges to the ballots of Clarence and Arnold Mueller. These two rulings constitute our immediate issue because, if they were not arbitrary or capricious, it is immaterial that the Regional Director did not count the ballot of Schnorenberg after the challenge thereto by the Union had been withdrawn.

The Board's policy on excluding close relatives of management officials from bargaining units of rank-and-file employees is well established. As the Board said in Stanislaus Implement & Hardware Company, 92 NLRB 897, while "the Act does not expressly provide for" their exclusion from such units, the Act does impose upon the Board "the function of determining" the appropriate unit, and in the exercise of that function the Board traditionally excludes employees, such as close relatives of management officials, who do "not have a sufficient interest in common with the other employees. . . ."[6] In the Stanislaus case, the Board excluded a nephew of the employer's president-general manager and of its vice president. See also Oklahoma State Union, etc., 92 NLRB 248, 253; Greater Erie Broadcasting Company, 92 NLRB 270, 271; Apex Toledo Corporation, 101 NLRB 807.

[6] The problem of close relatives of management officials is not the only problem which confronts the Board in determining whether employees who are not expressly excluded by the Act from units of rank-and-file employees should nevertheless be excluded. As the Board said in its Sixteenth Annual Report at page 117, it "is often confronted with a request that certain employees be excluded from a collective bargaining unit" either because they are nonsupervisory managerial employees or because of a "confidential relationship to management." In such cases, said the Board, it "must balance the statutory right of an employee to engage in collective bargaining against the traditional right of management to be secure in its secret or confidential data. . . ."

In support of its contention that the Regional Director was arbitrary or capricious in sustaining the challenges to the ballots of Clarence and Arnold Mueller, the Respondent argues that the two Muellers are embraced within the descriptive language of the appropriate unit, as set out in the consent-election agreement, that the Regional Director approved that agreement, and that thereafter the Respondent and the Union agreed upon a list of eligible voters containing the names of the two Muellers at a preelection conference which took place pursuant to Section 101.18 (a) (1) of the Board's Statements of Procedure. That section provides that in consent-election cases a Board agent "usually arranges preelection conferences in which the parties check the list of voters and attempt to resolve any questions of eligibility." According to the Respondent, the Union's challenge to the ballot of Clarence Mueller was an effort to renege from its approval of the list of voters, which should not be countenanced. Moreover, says the Respondent, if the Board should not adhere to the descriptive language of the bargaining unit which all parties approved, and to the list of voters which the Respondent and the Union approved, the Board would be "interposing its judgment as to an employee's interest in the bargaining unit in derogation not only of the employer's and the union's agreement," but in derogation also of the employee's rights under the Act. The Respondent also argues that Clarence and Arnold Mueller, being within the descriptive language of the unit, have a definite interest in whether to be represented by a labor organization and cannot lawfully be denied an opportunity to signify their choice.

The Respondent's argument that its agreement with the Union on an eligible list of voters is binding upon the Board and the Regional Director, and that neither the Board nor the Regional Director may interpose an independent judgment, is not well founded. We do not have here a situation where an employer and a labor organization sought to resolve a representation dispute without utilizing the processes of the Board, in which event they might have avoided the Board's policies. They sought instead to utilize those processes, and in doing so they agreed to abide by the policies of the Board and to leave the issues to determination by the Regional Director. Those policies are well established. No employee has a right to cast a ballot in a Board election without challenge, Armco Drainage & Metal Products, Inc., 77 NLRB 815, and eligibility issues are not necessarily resolved in the preelection stages, as the Board's Rules and Regulations providing for challenges by its agents and others make clear. Volney Felt Mills, Inc., 101 NLRB 1516. The Board, and not the parties, decides the scope of the bargaining unit, Lloyd A. Fry Roofing Company et al, 92 NLRB 1170, and either a labor organization or an employer may make challenges to the ballots of "employees whose right to vote had been agreed upon." Craddock-Terry Shoe Corporation, 80 NLRB 1239. Moreover, the Board has sustained challenges to the ballots of relatives of management where the employer and labor organization had agreed upon the descriptive language of the bargaining unit, Kol-Master Corporation, 75 NLRB 1229, 77 NLRB 466, and it is immaterial whether the employer or labor organization seeks the exclusion of the relative of the former. Oklahoma State Union, etc., supra. The Respondent's citation of Dadourian Export Corporation, 80 NLRB 1400, is inapposite. In that case, while the Regional Director ruled that certain relatives of management officials were eligible to vote, the Board did not pass upon the rulings because no valid exceptions were filed. Thus, the Dadourian case represents the judgment of a Regional Director which was not reviewed by the Board. It does not represent, as the Respondent asserts, an authoritative precedent. Here, where the Respondent and the Union submitted their dispute to the Regional Director for determination, and he followed well-established principles and procedures of the Board, it may not reasonably be said that his determinations were arbitrary or capricious. That is the controlling point, not whether I or someone else would have made contrary determinations. Consequently, the Regional Director's determinations may not be disturbed. Finally, the Respondent's argument that the Regional Director, by sustaining the challenges to the ballots of Clarence and Arnold Mueller, deprived those employees of the right to vote upon the question of union representation, while leaving them within the unit of employees represented by the Union, is unsound. When the Regional Director sustained the challenges, those employees were excluded from the unit. Stanislaus, supra.

I find that on July 1, 1952, the date of the Regional Director's certification of the Union, and at all times thereafter, the Union was the duly designated representative of a majority of the employees in the appropriate unit and, pursuant to Section 9 (a) of the Act, has been and is now the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The refusal to bargain

On July 19, 1952, the Union wrote to the Respondent, enclosing a proposed contract and asking that a date be fixed for negotiations. On or about July 21 the Respondent received the communication. It is undisputed that the Respondent has consistently declined to bargain with the Union. I find that on July 21, 1952, and at all times thereafter, the Respondent refused to bargain collectively with the Union, in violation of Section 8 (a) (5) and (1) of the Act.

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

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the 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 the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. I have found that the Union represented a majority of the employees in an appropriate unit and that the Respondent refused to bargain collectively with it. Accordingly, it will be recommended that the Respondent, upon request, bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit.

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

## CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2 (5) of the Act.
2. All employees of the Respondent at its Hartford, Wisconsin, place of business, excluding salesmen, foremen, and office clerical employees 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.
3. The Union, on July 1, 1952, was, and at all times thereafter has been, the exclusive representative of all employees in such unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.
4. By refusing to bargain collectively with the Union as the exclusive representative of its employees in an 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.
5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.
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 omitted from publication.]

# APPENDIX

## 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, upon request, bargain collectively with District No. 48, International Association of Machinists, AFL, as the exclusive representative of all employees in the follow-

ing bargaining unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement:

All employees at our Hartford, Wisconsin, place of business, excluding salesmen, foremen, and office clerical employees as defined in the Act.

WE WILL NOT in any manner interfere with the efforts of District No. 48, International Association of Machinists, AFL, to negotiate for or represent the employees in the aforesaid unit as their exclusive bargaining agent.

P. A. MUELLER AND SONS, INC.,
Employer.

Dated ..... By .....
(Representative) (Title)

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

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## PILE DRIVERS, BRIDGE, WHARF AND DOCK BUILDERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION NO. 34, AFL[1] *and* SAMUEL A. AGNEW, d/b/a KLAMATH CEDAR COMPANY. Case No. 20-CD-33. June 12, 1953

## 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 March 17, 1953, Samuel A. Agnew, d/b/a Klamath Cedar Company, hereinafter called the Company, filed with the Regional Director for the Twentieth Region of the Board a charge, and on March 24, 1953, an amended charge, against Pile Drivers, Bridge, Wharf and Dock Builders, United Brotherhood of Carpenters and Joiners of America, Local Union No. 34, AFL, hereinafter called the Respondent, alleging that it had engaged in and was engaging in certain activities, proscribed by Section 8 (b) (4) (D) of the Act. It was alleged, in substance, that the Respondent had induced and encouraged the employees of the Company to engage in a concerted refusal to work in the course of their employment with the object of forcing or requiring the Company to assign particular work to members of the Respondent rather than to employees of the Company.

Thereafter, pursuant to Section 10 (k) of the Act and Sections 102.71 and 102.72 of the Board's Rules and Regulations, the Regional Director investigated the charge and provided for an

[1] The Union's name appears as corrected at the hearing.