employees, transferred from the unit B list, voted in unit A without challenge. The Petitioner admits that it was apprised of this change in the eligibility lists by the Employer's attorney on the evening before the election, and that no steps were taken during the voting to challenge the ballots of the 12 employees.

The investigation discloses that the 12 employees added to the maintenance list in unit A work under the supervision of the general maintenance superintendent, and are stationed in the craft shop where other maintenance employees included in unit A are headquartered. Although these 12 employees are classified as mechanics and mechanics' helpers on both lists, 6 of them are truckdrivers working with and servicing the maintenance group removed from central facilities and which was included in unit A in our Decision and Direction of Election. The other 6 employees in dispute are riggers, bulldozer operators, and crane operators working in and with the same general maintenance group.

We find that those 12 employees are part of the maintenance group in unit A and therefore properly voted in that unit. In accord with the Regional Director's recommendation, we find that the Petitioner's objections are without merit and they are hereby overruled.

As the Intervenor won the election in unit A and the Petitioner won the election in unit B, we shall certify each of them as the representative of the employees in units A and B, respectively.

[The Board certified the Oil Workers International Union, CIO, as the designated collective-bargaining representative of the employees at the Employer's operations at the Atomic Energy Project near Arco, Idaho, in unit A, heretofore found appropriate, and the Eastern Idaho Metal Trades Council, AFL, as the designated collective-bargaining representative of the employees at the Employer's operations at the Atomic Energy Project near Arco, Idaho, in unit B, heretofore found appropriate.]

WAGNER IRON WORKS, a corporation *and* INTERNATIONAL UNION, UNITED AUTOMOBILE AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO

WAGNER IRON WORKS, a corporation *and* INTERNATIONAL UNION, UNITED AUTOMOBILE AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO *and* BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS SHOPMEN'S LOCAL 471 (AFL), Party to the Contract *and* THE "TEMPORARY COMMITTEE," Interested Party *and* THE EMPLOYEE'S INDEPENDENT UNION OF WAGNER IRON WORKS, Interested Party

BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS SHOPMEN'S LOCAL 471 (AFL), a labor organization *and* INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO. Cases Nos. 13-CA-849, 13-CA-864, and 13-CB-148. June 7, 1954

ORDER DENYING PETITION FOR RECONSIDERATION

On April 28, 1953, the National Labor Relations Board issued its Decision and Order in this proceeding,[1] finding that the Respondent, Wagner Iron Works, violated Section 8 (a) (1), (2), and (3) of the Act. More specifically, the Board found that the Respondent engaged in various acts of interference, including threats, bribes, surveillance, and interrogation, assisted the AFL in an AFL-CIO rivalry situation, laid off 22 employees, and discharged 4 employees to discourage activity on behalf of the CIO. The Board further found that the Respondent unlawfully discharged and refused to reinstate 57 employees who participated in an unfair labor practice strike.

In connection with the last-mentioned finding, the Board rejected the Respondent's defense that the strike was in breach of a contract containing a no-strike clause and that the strikers had lost their employee status because the strike took place under circumstances which did not meet the requirements of Section 8 (d) of the Act. In so doing, the Board held, among other things not pertinent now, that such defenses were not available to an employer where he provoked the strike by his own flagrant unfair labor practices.

Thereafter, on June 25, 1953, the Respondent filed a "Motion to Reopen Record and to Remand Proceedings to Trial Examiner," with respect to 2 employees found in the Board's decision to have been discharged on May 26, 1951, not for drunkenness as alleged by the Respondent, but for union activities. In that motion, the Respondent sought to show that 1 of the 2 employees had a long police record of convictions on charges of drunkenness, the last conviction having occurred on February 18, 1951, and that the other employee was convicted on a charge of drunkenness on August 9, 1951. The motion did not attack any other portion of the Board's Decision and Order.

On August 10, 1953, the Board denied the Respondent's motion to reopen the record on the stated grounds (1) that the employees' convictions for drunkenness on other remote occasions had little, if any, probative weight to establish their condition at or about the time of their discharge; and (2) that, in any event, the Board's original decision was based on the finding that the two employees were discharged because of their CIO activity and not because of their condition as to

[1] 104 NLRB 445

sobriety, whatever it might have been at the time of their discharge.[2]

On March 29, 1954, approximately 11 months after issuance of the Board's Decision and Order in this case, the Respondent filed its "Petition for Reconsideration and Reversal of Board's Decision of April 28, 1953."[3] The General Counsel and the UAW-CIO, the charging Union in this case, object to the granting of the Respondent's petition on certain procedural grounds.[4]

In its petition, the Respondent contends, principally, that the Board's Decision is erroneous because it conflicts with a recent opinion of the Court of Appeals for the Eighth Circuit in Local 3, United Packinghouse Workers of America v. N. L. R. B.,[5] and, the Respondent urges the Board, in view of the changed composition of the membership of the Board since issuance of the decision in this case, to reconsider the decision and set aside its order.

In the United Packinghouse Workers case, the court held that economic strikers lost their status as employees by engaging in a strike before the expiration date of an existing contract even though the strike did not occur until 60 days after the giving of notice required by Section 8 (d) of the Act. There, the employees struck to obtain a change in the contract, the very situation Congress had in mind in enacting Section 8 (d). Clearly, that case is not controlling here for, among other things, unlike the situation in the United Packinghouse Workers case, the Respondent's unfair labor practices caused the strike. The issue as to the applicability of Section 8 (d) to an unfair labor practice strike was not presented in the United Packinghouse Workers case, and the court did not pass upon that question.

For the reasons stated in Mastro Plastics Corp. and French-American Reeds Manufacturing Co., Inc., 103 NLRB 511, the Board, some time ago, decided that Section 8 (d) has no applicability to an unfair labor practice strike.[6] Since that

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[2] 106 NLRB 675. In finding that the discharge of these 2 employees, who had attempted to have other employees switch their allegiance from the AFL to the CIO, was discriminatory although the 2 employees had just concluded a 3-day tour of local taverns during their campaign for CIO solicitation, the Board relied on the following factors: (1) It was not uncommon for employees to report for work with liquor on their breath, (2) the 2 employees were not sufficiently under the influence of liquor to affect the performance or quality of their work or to suggest to their supervisors that they be sent home; (3) neither employee had previously been warned of inebriation on the job; and (4) their supervisor subsequently stated to them and to another employee that they were discharged because of their activity on behalf of the CIO.

[3] The Board now has pending, in the Court of Appeals for the Seventh Circuit, its petition for enforcement of its Decision and Order in this case. However, the transcript of the Board proceedings has not yet been certified to the court.

[4] In view of our decision herein, we need not and do not pass on the validity of the procedural grounds urged by the General Counsel and the charging Union for denial of the petition.

[5] 210 F. 2d 325.

[6] The Mastro Plastics case is now before the Court of Appeals for the Second Circuit, pending decision, on the Board's petition for enforcement.

time the composition of the membership of the Board has changed. But, changes in the membership of an agency do not constitute a ground for reopening and reconsidering matters previously adjudicated.[7] The Board is an independent, continuing statutory agency of a quasi-judicial nature. The terms of its members were arranged by Congress in a manner to prevent any abrupt dislocation in the discharge of its functions. The Board, like the courts, operates prospectively, not retroactively. As Chairman Howrey stated, in delivering the opinion of the Federal Trade Commission in the Chain Institute case:

> While the views of individual commissioners may differ, each is like a member of the judiciary in the sense that he customarily makes decisions on upcoming issues on a case-by-case basis. A judge appointed to fill a vacancy on the bench does not set about to reopen and retry previously adjudicated cases simply because he is a new member.
>
> The machinery of the quasi-judicial agency, like the courts, contemplates a continuing process; it looks to current litigation, not past litigation. If our procedures were otherwise, delay and inaction would surround enforcement of the statutes committed to the Commission's jurisdiction. To grant the present motion would be to require a third review of a voluminous record made many years ago.
>
> The principal question presented by the motion, as we see it, is whether the Commission, in prescribing a remedy ... can require respondents [etc.] .... This is an important question and if it were not for the overriding considerations already stated, the motion might be well grounded. However, since the question of the remedy is one of law, the respondents will not be prejudiced. They will, we are certain, receive a full hearing on this question in the court of appeals.

We think that these considerations, in substance, apply with equal force in the instant case. For the reasons indicated, this Board will not entertain any request for reconsideration of Board action based solely on the ground of a change in composition of the Agency's membership.

The Respondent also asserts in its petition that Board personnel, who participated in this case in the field, engaged in "outrageous conduct"; that the Trial Examiner refused to permit proof of such misconduct; and that such "misconduct denied the Company due process of law." However, the Respondent's petition does not specify the nature of the alleged

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[7] Chain Institute, Inc., Federal Trade Commission, January 6, 1954.

misconduct and, we know of none. These allegations are not borne out by the record in this case.

Finally, the Respondent asserts that "one of the trail [sic] examiners in this case later became an attorney for the UAW-CIO--the very Union in this case in whose favor the Order of April 28, 1953, was granted." Even if true, standing alone, we see no reason why this affords a basis for reconsideration of the case.

As portions of the Respondent's petition for reconsideration raise no matter not previously considered by the Board and the remainder is without merit, the petition is hereby denied.

Chairman Farmer, dissenting:

This is a motion for reconsideration in which one of the parties contends that the issue of law, involving the construction of a section of the Act, was incorrectly decided. Although enforcement proceedings have been instituted in the court of appeals, the transcript of the Board proceedings has not yet been certified to the court, and the motion therefore may lawfully be considered by the Board at this time. Without considering the merits of the question of law raised by the motion, the majority denies it as being without merit. I disagree with the majority conclusion that the merits of the motion ought not be considered.

I agree with my colleagues that changes in the membership of this Board are insufficient ground for reopening and reconsidering cases previously adjudicated. I doubt that this wholesome principle, however, can extend to issues involving direct construction and interpretation of the statutory language itself. Certainly, I agree that previous adjudications which ought not be disturbed include such issues as question of fact, sufficiency of evidence, or matters of Board policy, which from time to time may be altered by the Board. But, I am unable to go all the way with my colleagues although I appreciate fully the reasons for their position. The difficulty is that the Board's function does not end with the decision of a case. If it did, I would be perfectly willing and in fact desirous of allowing decisions to stand on their own merits in the reviewing courts. But the Board also has the continuing responsibility through the agency of the General Counsel to enforce its decisions in the appellate courts, which places us in the position of having to reaffirm, before the courts, legal interpretations made by our predecessors in cases in which we did not participate and therefore had no opportunity to consider them or to form a considered judgment.

This places the Board in an awkard position vis a vis those cases which were decided by our predecessors and are now at the court enforcement stage. Ordinarily, I would not wish to reconsider substantial issue questions already decided, but where there are presented important questions of statu-

tory interpretation, I feel that we cannot avoid the responsibility.

There are important issues of law raised by the motion in this case. As the majority has decided to deny this motion without considering the legal questions raised, I find no occasion here to express any opinion upon them. Indeed, I have arrived at none. I hold only that it is proper for the Board to consider those questions as raised by the motion at this stage in this proceeding, and I would grant the motion to that extent.

Member Murdock took no part in the consideration of the above Order Denying Petition for Reconsideration.

MILLS-MORRIS COMPANY *and* RADIO AND TELEVISION ENGINEERS LOCAL 1275, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL. Case No. 32-CA-344. June 8, 1954

DECISION AND ORDER

On January 15, 1954, Trial Examiner Eugene E. Dixon 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 General Counsel and the Respondent filed exceptions to the Intermediate Report and supporting briefs.

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.[1] The Board has considered the Intermediate Report,[2] the exceptions and briefs, and the entire record in this case, and hereby adopts

[1] The Respondent excepted to the Trial Examiner's ruling permitting the General Counsel to amend the complaint to allege that Foreman O'Kelly threatened employees on July 10, 1953, that the Respondent's plant would be closed down if the Union's organizational campaign was successful. The Trial Examiner assured the Respondent that he would favorably consider any request by the Respondent at the end of the hearing for additional time in order to prepare to meet this allegation. No such request was made and the issue was fully litigated. Under the circumstances, we find that the Respondent was not prejudiced by the Trial Examiner's ruling. We shall therefore overrule this exception. See Coca-Cola Bottling Company of St. Louis, 95 NLRB 284.

[2] The Intermediate Report contains certain inadvertences, none of which affects the Trial Examiner's ultimate conclusions or our concurrence therein. Accordingly, we make the following corrections: (a) page 1247, par. 3, the date "April 25" should read "April 27;" (b) page 1250, par. 4, the date "April 23" should read "April 22."