strike which burdens and obstructs commerce and thus effectuate the policies of the Act, it will be recommended that Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. United Furniture Workers of America, CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All of Respondent's production and maintenance employees, excluding all supervisors (as the term is defined in Section 2 (11) of the Act) and all office clerical employees, guards, and professional employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. At all times since October 18, 1950, the Union has been and now is the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By failing and refusing at all times since October 19, 1950, to bargain collectively with United Furniture Workers of America, CIO, as the exclusive representative of the employees in the aforesaid unit Respondent has engaged in and is engaging in unfair labor practices with the meaning of Section 8 (a) (5) and (1) of the Act.

5. By discriminating in regard to the hire and tenure of employment of the individuals who are referred to under the preceding section entitled "The Remedy," thereby discouraging membership in United Furniture Workers of America, CIO, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) and (1) of the Act.

6. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

7. 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 in this volume.]

GEORGE SEXTON, AN INDIVIDUAL, D/B/A SEXTON WELDING COMPANY *and* LOCAL NO. 105, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS & HELPERS OF AMERICA, AFL. *Case No. 9-CA-513. July 23, 1952*

Decision and Order

On June 10, 1952, Trial Examiner Arthur Leff issued his Intermediate Report in this 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 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 Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, George Sexton, an individual, doing business as Sexton Welding Company, Ashland, Kentucky, his agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local No. 105, International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America, A. F. L., as the exclusive representative of his employees in the following unit:

All employees of the Respondent at his Ashland, Kentucky, operations, excluding all office and clerical employees, and all guards, professional employees, and supervisors as defined in the Act.

(b) Engaging in any like or related acts or conduct interfering with the efforts of Local No. 105, International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America, A. F. L., to negotiate for or represent the employees in the aforesaid unit as 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 Local No. 105, International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America, A. F. L., as the exclusive bargaining agent of all employees in the bargaining unit described above in paragraph 1 (a) herein, with respect to wages, rates of pay, hours of employment, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

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[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 [Chairman Herzog and Members Murdock and Peterson].

[2] The Respondent's exceptions relating to the eligibility of Henry Sexton and Charles M Francis raise issues which the Board has already considered in the earlier representation proceeding (96 NLRB 454) The Respondent's remaining exception to the finding of the Trial Examiner "that the Union's loss of majority after the election but before certification or demand for bargaining made upon the employer did not affect its right to such certification or to be recognized thereafter as the bargaining agent for the employees of respondent," is without merit for the reasons and the cases cited by the Trial Examiner in the Intermediate Report. See also *Cheney California Lumber Company*, 62 NLRB 1208, enfd. 154 F 2d 112 (C. A. 9); *Anderson Manufacturing Company*, 58 NLRB 1511.

(b) Post at his plant at Ashland, Kentucky, copies of the notice attached to the Intermediate Report herein, marked "Appendix A."[3] Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by him for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) File with the Regional Director for the Ninth Region within ten (10) days from the date of this Order a report in writing setting forth in detail the manner and form in which the Respondent has complied with the foregoing Order.

[3] This notice, however, shall be, and it hereby is, amended by striking from the first paragraph thereof the words "The Recommendations of a Trial Examiner" and substituting in lieu 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 the United States Court of Appeals, Enforcing an Order."

Intermediate Report

STATEMENT OF THE CASE

A charge having been filed by Local No. 105, International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America, A. F. L., herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for the Ninth Region (Cincinnati, Ohio), issued his complaint dated April 21, 1952, against George Sexton, an individual, doing business as Sexton Welding Company, and herein called the Respondent. The complaint alleged in substance that the Respondent engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act, in that the Respondent, on or about November 20, 1951, and thereafter, refused to bargain collectively with the Union as the exclusive bargaining representative of the Respondent's employees within an appropriate bargaining unit, although a majority of the employees in the appropriate unit in an election conducted under the supervision of the Board's Regional Director selected, and the Board duly certified, the Union as the exclusive representative of such employees for the purposes of collective bargaining. The Respondent in his answer denied that the Union now is or ever was the majority or lawfully authorized exclusive bargaining representative of the employees in the appropriate unit, and alleged that the Respondent failed to bargain with the Union for that reason.

Pursuant to notice, a hearing was held on May 6, 1952, at Ashland, Kentucky, before Arthur Leff, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented at the hearing by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the conclusion of the hearing, a motion was granted to conform the pleadings of the proof. Ruling was reserved on a motion of the Respondent to dismiss the complaint for insufficiency of proof. That motion is disposed of in

accordance with the findings of fact and conclusions of law made below. Opportunity was afforded all parties to argue orally upon the record at the close of the case, and to file briefs and proposed findings and conclusions. After the hearing, a brief was received from the Respondent.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

George Sexton, an individual doing business as Sexton Welding Company, has his office and only place of business at Ashland, Kentucky, where he is engaged in the business of job welding and contract welding. During the year 1951, a representative period, the Respondent furnished and sold to Armco Steel Corporation at Ashland, Kentucky, goods and services valued in excess of $100,000. During the same period, Armco Steel Corporation caused goods and products valued in excess of $50,000 to be shipped directly from its Ashland, Kentucky, plant, to points outside the State of Kentucky. At all times material herein the Respondent in the course of his business operations purchased and had shipped to him from points outside the State of Kentucky goods and materials of substantial value, and also sold from his Ashland plant for delivery to points outside the State of Kentucky goods of substantial value. The Respondent has also made substantial sales to, and performed substantial services for, instrumentalities of commerce, transit systems, and enterprises which are themselves engaged in producing or handling goods destined for out-of-State shipment and in performing out-of-State services in substantial amounts. The Respondent admits he is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local No. 105, International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Respondent.

III. THE UNFAIR LABOR PRACTICES

On April 27, 1951, the Respondent and the Union executed, and on April 30, 1951, the Board's Regional Director for the Ninth Region approved, a stipulation for certification upon consent election in Case No. 9–RC–1182. The parties agreed in the stipulation, the Respondent concedes in this proceeding, and it is found, that the appropriate collective bargaining unit is as follows:

> All employees of the Employer [Respondent] at its Ashland, Kentucky, operation, excluding all office and clerical employees, and all guards, professional employees and supervisors as defined in the Act.

Pursuant to the stipulation, an election by secret ballot was conducted under the supervision of the Regional Director on May 7, 1951. Upon the conclusion of the election, a tally of ballots was furnished to and certified by the observers for the Union and the Respondent. The tally showed that of approximately 16 eligible voters in the aforesaid appropriate unit, 15 voted, and of these, 6 voted in favor of representation by the Union, 6 against, and 3 voted challenged ballots. No objections to the conduct of the election were filed.

Since the challenged ballots were sufficient in number to affect the results of the election, the Regional Director, pursuant to Section 102.61 (b) of the Board's Rules and Regulations, caused an investigation to be made of the challenged

ballots and, on July 8, 1951, issued his report on challenged ballots. With regard to the ballot of Henry Sexton, challenged by the Union's observer on the ground that he was a close relative of the Respondent, the Regional Director reported:

> The investigation reveals that Henry Sexton is a nephew of the employer. In the light of the Board's decision in *Stanislaus Implement and Hardware Company*, 92 NLRB 897, wherein it was stated that although the Act does not expressly provide for closely related relations of management to be excluded from the bargaining unit, Section 9 (b) of the Act does impose upon the Board the function of determining in each case the appropriate unit for collective bargaining and that a policy has been established by the Board that nephews of management officials were to be excluded from the bargaining unit, the undersigned therefore finds that the subject employee was not an eligible voter in the election.

With regard to the ballot of Edgar Crisp, challenged by the Respondent on the ground that he was no longer employed by the Respondent, the Regional Director found in agreement with the Respondent that Crisp was not an eligible voter. With regard to the ballot of Charles M. Francis, challenged by the Board agent on the ground that his name did not appear on the list of eligible voters, the Regional Director, after reviewing the facts disclosed by his investigation, upheld the Union's position that Francis was an employee on sick leave at the time of the election, as against the Respondent's position that Francis' employment had been terminated prior to that time, and found that Francis on the date of the election was an employee eligible to vote. The Regional Director recommended in conclusion that the challenges to Sexton's and Crisp's ballots be sustained and that the challenge to Francis' ballot be overruled and his ballot opened and counted.

On or about July 21, 1951, the Respondent filed with the Board exceptions to the Regional Director's report on challenged ballots insofar as it related to Sexton and Francis. There was no exception to the finding on Crisp. On July 31, 1951, the Board issued an order directing that a hearing be held for the limited purpose of taking evidence on the eligibility of Francis to vote in the election. Pursuant to the order, a hearing was held on August 21, 1951, at Ashland, Kentucky, in Case No. 9–RC–1182. Following the hearing, the Board issued a Supplemental Decision and Direction (96 NLRB 454). The Board adopted the Regional Director's findings and recommendations concerning the ballots of Sexton and Crisp And, on the basis of the entire record, including the Regional Director's report, the Respondent's exceptions to it, and the evidence adduced at the hearing ordered by it, the Board found as a fact, contrary to the Respondent's contention, that "Francis' employment had never been terminated, he was in effect an employee absent on sick-leave, and under the established policy of the Board, was eligible to vote." The Board therefore adopted the Regional Director's recommendation that the challenge to Francis' ballot be overruled and that his ballot be opened and counted.

Thereafter, on October 8, 1951, the Regional Director issued a revised tally of ballots, showing that of 13 valid votes counted, 7 voted for, and 6 against, representation by the Union. On October 19, 1951, the Board certified that the Union had been designated and selected by a majority of the employees in the aforesaid appropriate unit as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, as amended, the Union was the exclusive representative of all employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

On or about November 20, 1951, the Union requested the Respondent to bargain collectively with it as the exclusive representative of the Respondent's employees in the unit found appropriate above. The Respondent refused, asserting then, as it does now, that the Union did not represent a legal majority of the Respondent's employees and was not the lawfully authorized representative of said employees for the purposes of collective bargaining.

Three points are urged by the Respondent in support of his position. Two of them have already been considered by the Board in the representation proceeding, and ruled upon by it adversely to the Respondent's position. One is that the Board had no authority, as a matter of law, to sustain, as it did, the challenge to Sexton's ballot on the ground that Sexton was a near relative, a nephew in this case, of the employer. The other is that the evidence adduced at the hearing relating to Francis' challenge did not substantiate the Board's finding that Francis possessed employee status at the time of the election. On the second point, the Respondent offered no new evidence, but relied entirely on the record earlier made. Since the question of law raised by the Respondent's first point, and the question of fact raised by his second, have already been passed upon by the Board, the determinations made by the Board regarding them must be regarded by me as establishing the law of the case. Consequently, and in accordance with the Board's previous determination, I find the Respondent's contentions to be without merit.

The Respondent's third point is new. He contends that after the election but before the Union's certification, the Union lost any majority it might have had at the time of the election. To support this contention, and the Board's alleged notice of it prior to the issuance of the certification, the Respondent introduced into evidence a letter, dated July 3, 1951, written by his attorney to the Board's attorney who was in charge of the representation case. The letter referred to various changes in personnel that had occurred since the election, including the employment of one new employee and the voluntary termination of three—Burchett, Gray, and Davis. Burchett had been the Union's observer at the election, and it is now the Respondent's position that the letter, although not expressing it, placed the Board on notice before the certification date that the Union had lost one of its supporters, enough to destroy its majority. The Respondent supplemented this letter by oral testimony, not contradicted, of Essie Sexton, wife of the Respondent and keeper of his employment records. Mrs. Sexton, in addition to verifying the truth of the letter's statements relating to personnel turnover, testified that when Burchett, Gray, and Davis quit their employment, one of them told her that the Union had obtained jobs for them elsewhere. From this the Respondent would have it inferred that not only Burchett, but Gray and Davis as well, were union supporters, and that their leaving meant a loss of three votes the Union had received at the election. On the basis of the foregoing circumstances, the Respondent argues in substance that, whatever the situation may have been on the date of the election, the Union did not in fact command a majority on the date of certification and was therefore ineligible for certification at that time. Because—the Respondent's argument continues—the letter of July 3, 1951, put the Board under a duty of inquiry to determine whether the Union had lost its majority, the Board may not now rely on the certification to presume the Union's majority as of the date of the Respondent's refusal to bargain.

It is doubtful whether the letter of July 3, 1951, can be considered sufficient in form to have put the Board on notice prior to the issuance of the certification that the Respondent was claiming a loss of majority in the period intervening between the election date and the certification date; but even if it were so construed it would make no difference. Once a majority has been established as a

result of a Board-conducted election by secret ballot, that majority is presumed to continue for a reasonable length of time, normally for at least a year, despite personnel changes that may thereafter occur. It is not for the Board to speculate how individual employees cast their secret ballots, or to infer from extrinsic evidence, as the Respondent would have it done here, that certain employees since terminated probably voted for the Union, that their replacements may have felt differently toward the Union, and that employees who voted against the union did not thereafter change their position The evidence upon which the Respondent relies in this case is of no probative value in overriding the presumption of majority status flowing from the results of a secret ballot election. Absent unusual circumstances—not present in this case—the legal presumption is a conclusive one, that a union designated by a majority in an election continues to maintain its majority status for at least a year. And it has often been held that even a substantial turnover of employees within the year does not afford proof of a loss of majority sufficient to rebut that presumption.[1]

In this case, the Respondent does not quarrel with the principle, by now firmly rooted in the law, that a certification must be honored for a reasonable time, usually at least a year, despite some evidence of repudiation of the union or loss of majority after the certification. But he contends the conclusive presumption of majority status flowing from a certification does not reach the state of facts present in this case, where the loss of majority is claimed to have occurred *before* the certification, though after the election. The distinction which the Respondent would draw is I think an untenable one. The date on which a certification is issued has no special significance in itself. The certification is nothing more than the formal instrument by which the Board certifies to a state of facts found established by a valid employee election. It is the election and not the formal fact-finding instrument that determines the majority status and gives rise to the presumption of continuity. The same administrative and policy considerations that justify in part the conclusive presumption given to certifications—the need of endowing some measure of finality and permanence to an election choice once made[2]—apply with equal if not greater force to the period intervening between the election and the certification Where ballots are challenged or objections to an election filed, a period of time, often substantial, must necessarily elapse before the objections or challenges can be processed, and it is to be expected that personal changes frequently will occur in the meantime. Any rule such as that urged by the Respondent, that would require a reexamination of the election results where such changes appear, would not only tend to destroy the element of finality in elections, but would "make chaos out of the administration of the statute and prevent the protection of the very rights which it aimed to secure." *N. L. R. B.* v. *Botany Worsted Mills*, 133 F. 2d 876 (C. A. 3). Even if there had been doubt on that point before, that doubt must be viewed as resolved by the enactment of Section 9 (c) (3) of the amended Act which proscribes the holding of more than one valid election in a bargaining unit during any 12-month period. Had the Board found after consideration of the challenged ballots that the Union lost the election, the Union could not have sought a redetermination of its status

[1] See, e. g., *The Century Oxford Manufacturing Corporation*, 47 NLRB 835, enfd. 140 F. 2d 541, cert. den. 323 U. S. 714 (60 percent labor turnover and attempted employee repudiation of the union before refusal to bargain); *S. H. Kress & Company*, 88 NLRB 292, enfd. 194 F. 2d 449 (C. A. 6) (of 40 employees in the unit, only 7 had been on the election payroll); *Worcester Woolen Mills Corporation*, 74 NLRB 1071, enfd 140 F 2d 13 (C. A. 1) (after the union had won an election by a vote of 32 to 27, 12 employees left the respondent's employ); *Aetna Fire Brick Company*, 56 NLRB 849 (after the union had won an election by a vote of 29 to 28, 16 new employees were hired).

[2] See *N. L. R. B.* v. *Appalachian Power Co.*, 140 F. 2d 217 (C. A. 4); *N. L. R. B.* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541 (C. A. 2).

within the year on the basis of changed conditions occurring after the date of the election and before the Board's final determination of the election issues. No reason appears why less finality should be accorded the election results because the Union won.

On the basis of the record as a whole, it is concluded and found that on November 20, 1951, and at all times thereafter, the Union was, and now is, by virtue of Section 9 (a) of the Act, the exclusive representative of all employees in the aforesaid unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment. It is further found that by refusing to bargain with the Union as such exclusive bargaining representatives on November 20, 1951, and thereafter, the Respondent violated Section 8 (a) (5) of the Act. By such conduct, the Respondent also interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

It is found that 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

It having been found that the Respondent has engaged in unfair labor practices, it will be recommended that he cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that the Respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that the Respondent upon request bargain collectively with the Union.

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

CONCLUSIONS OF LAW

1. Local No. 105, International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America, A. F. L., is a labor organization within the meaning of Section 2 (5) of the Act.

2. All of the Respondent's employees, at his Ashland, Kentucky, operation, excluding all office and clerical employees, and all guards, professional employees and supervisors 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 was on and after the date of the refusal to bargain set out in paragraph numbered 4, below, the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on November 20, 1951, and at all times thereafter, to bargain collectively with the Union as the exclusive representative of all its employees in the unit described in paragraph numbered 2, above, 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 his 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 in this volume.]

Appendix A

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT engage in any acts in any manner interfering with the efforts of LOCAL NO. 105, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS & HELPERS OF AMERICA, A. F. L., to negotiate for or represent the employees in the bargaining unit described below.

WE WILL bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described below with respect to wages, rates of pay, hours of employment and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees of the undersigned at his Ashland, Kentucky, operation, excluding all office and clerical employees, and all guards, professional employees, and supervisors as defined in the National Labor Relations Act.

GEORGE SEXTON d/b/a SEXTON WELDING COMPANY.

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.

THE KROGER CO. *and* LILLY MAY PARRETT. *Case No. 13-CA-741. July 24, 1952*

Decision and Order

STATEMENT OF THE CASE

Upon a charge duly filed on December 18, 1950, by Lilly May Parrett, herein called Parrett, the General Counsel of the National Labor Relations Board, herein called the General Counsel and the Board, respectively, by the Regional Director for the Thirteenth Region (Chicago, Illinois), issued his complaint on July 21, 1951, alleging that The Kroger Co., Wabash, Indiana, had engaged in and was en-