If a majority of the employees in voting group (1) do not vote for the Aluminum Workers and the majority of the employees in voting group (2) do not vote for the Trades Council, all these employees will be grouped together in a single production and maintenance unit and their votes shall be pooled to determine the majority representative of such unit.[10] The Regional Director conducting the election is instructed to issue a certification of representatives to the labor organization selected by a majority of the employees in the pooled group, which the Board, in such circumstances, finds to be a single production and maintenance unit appropriate for purposes of collective bargaining.

[Text of Direction of Election omitted from publication.]

[10] If the votes are pooled, they are to be tallied in the following manner: the votes for the Aluminum Workers and the Trades Council shall be counted as valid votes, but neither for nor against the union seeking to represent the more comprehensive unit; all other votes are to be accorded their face value whether for representation by the Petitioner or the I. A M., or for no union.

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BUFFALO ARMS, INC., DIVISION OF FRONTIER INDUSTRIES, INC. *and* UNITED STEELWORKERS OF AMERICA, CIO. *Case No. 3-CA-757. November 9, 1954*

## Decision and Order

On September 23, 1954, Trial Examiner Thomas N. Kessel issued his Intermediate Report [1] 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 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 briefs, 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, Buffalo Arms,

[1] The Intermediate Report contains a misstatement, which, however, does not affect the Trial Examiner's ultimate conclusions. Accordingly, we note the following corrections: page 819, par. 5 "that during 1953 the Respondent purchased materials valued in excess of $1,000,000 which were shipped across State lines" should read "in excess of $1,000,000 of which 50 percent were shipped across State lines."

[2] Respondent's request to present oral argument is denied for the reason that in the Board's opinion the record and briefs adequately present the position of the parties.

Inc., Division of Frontier Industries, Inc., Akron, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to bargain collectively with United Steelworkers of America, CIO, as the exclusive representative of all its employees, in the appropriate unit with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment.

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

(a) Upon request, bargain collectively with United Steelworkers of America, CIO, as the exclusive representative of the employees in the appropriate unit and embody any understanding reached in a signed contract.

(b) Upon application, offer immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to all those employees who went on strike on June 14, 1954, or thereafter, dismissing, if necessary, any person hired on or after that date, and make them whole, in the manner set forth in the section of the Intermediate Report entitled "The Remedy" for any loss of pay which they have suffered or may suffer by reason of the Respondent's refusal, if any, to reinstate them.

(c) Upon request, make available to the Board or its agents for examination and copying, all payroll, social-security, time, and personnel records necessary to determine the amount of back pay due and for the determination of reinstatement rights.

(d) Post at its plant in Akron, New York, copies of the notice attached hereto and marked "Appendix A."[3] Copies of said notice, to be furnished by the Regional Director for the Third Region, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 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.

(e) Notify the Regional Director for the Third Region in writing within ten (10) days from the date of this Order what steps Respondent has taken to comply therewith.

CHAIRMAN FARMER, dissenting:

I would not find a violation of Section 8 (a) (5) of the Act in this case because, as I indicated in my dissent in the early representation

[3] 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."

case, No. 3–RC–1307, I would accept the Regional Director's recommendation that the certification in favor of the United Steelworkers of America, CIO, be vacated.

## Appendix A

### Notice to All Employees

Pursuant to a Decision and Order 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 bargain collectively upon request with United Steelworkers of America, CIO, as the exclusive bargaining representative of all our employees in the appropriate unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an agreement is reached, embody such understanding in a signed contract. The appropriate unit is:

> All production and maintenance employees employed by Buffalo Arms, Inc., Division of Frontier Industries, Inc., at its Akron, New York, plant, including timekeepers, inspectors, leadmen, and lead inspectors, and excluding office clerical employees, guards, professional employees, the chief inspector, inspector foreman, and all other supervisors as defined in the Act.

We will, upon application, offer to all employees who went on strike on or about June 14, 1954, or thereafter, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may suffer as a result of our refusal to reinstate them upon such application.

All our employees are free to become or remain or to refrain from becoming or remaining members of United Steelworkers of America, CIO, or of any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

Buffalo Arms, Inc., Division of
Frontier Industries, Inc.,
*Employer.*

Dated_____ By_____
(Representative) (Title)

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

## Intermediate Report and Recommended Order

### STATEMENT OF THE CASE

Upon a charge filed by the United Steelworkers of America, CIO, herein called the Steelworkers, the General Counsel for the National Labor Relations Board, by the Regional Director for the Third Region (Buffalo, New York), issued his complaint dated June 14, 1954, against Buffalo Arms, Inc., Division of Frontier Industries, Inc., herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commercce within the meaning of Section 8 (a) (5) and (1) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act. Copies of the complaint and a notice of hearing were duly served upon the parties.

With respect to the unfair labor practices, the complaint alleged that the Respondent on and ever since December 14, 1953, refused and still refuses to bargain collectively with the Steelworkers although it was selected by the Respondent's employees as their collective-bargaining representative in a Board-conducted election on November 19, 1953, and pursuant thereto was certified by the Board as exclusive bargaining representative of these employees. The Respondent's answer admits that it refused to bargain with the Steelworkers as exclusive bargaining representatives of its employees, but denies that it thereby violated the Act. The answer affirmatively avers in substance that the Steelworkers does not hold a valid certification from the Board as the bargaining representative of its employees because the election pursuant to which such certification was issued was invalid, and was so declared by the Regional Director, and that the Board overruled the Regional Director's action in violation of the Act and its own Rules and Regulations.

Pursuant to notice a hearing was held at Buffalo, New York, on July 12, 1954, before Thomas N. Kessel, the Trial Examiner, duly designated by the Chief Trial Examiner. The General Counsel, the Respondent, and the Steelworkers were represented by counsel and other representatives. Ray Emendorfer, an employee of the Respondent, sought to enter an appearance in behalf of a group of Respondent's employees, indicating that his purpose was to secure injunctive relief against continuation of the strike being conducted against the Respondent, and to secure another Board-conducted election for a bargaining representative. Participation for these purposes was denied. Full opportunity to be heard and to introduce evidence was afforded all parties. After the hearing the Respondent filed a brief which has been duly considered.

Upon the entire record in the case, the Trial Examiner makes the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENT

The complaint alleges and the answer admits that the Respondent is a New York corporation with its principal office and place of business in Akron, New York, where it manufactures and distributes machine guns and other products under contract with the United States Air Forces; that during 1953 the Respondent purchased materials valued in excess of $1,000,000 which were shipped across State lines to its plant, and during the same period sold or manufactured products at its plant valued in excess of $2,000,000, of which approximately 50 percent was transported across State lines. From these facts it is found that the Respondent is engaged in commerce within the meaning of Section 2 (6) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

The United Steelworkers of America, CIO, is a labor organization admitting to membership employees of the Respondent.

#### III. THE UNFAIR LABOR PRACTICES

On October 30, 1953, the Steelworkers filed a representation petition [1] with the Board's Regional Office in Buffalo seeking certification as exclusive bargaining representative of the Respondent's production and maintenance employees with the exclusion of certain specified employee categories. Meanwhile, the International Association of Machinists, AFL, herein called the IAM, also claimed representation

[1] Case No. 3-RC-1307.

rights for these employees. Thereafter, an agreement for consent election was signed on November 10, 1953, by the Respondent, the Steelworkers, and the IAM and was approved the same day by the Regional Director. This agreement provided for the holding of a representation election on November 19, 1953, under the supervision of the Regional Director, among the Respondent's production and maintenance employees [2] with the names of the Steelworkers and the IAM to appear on the ballot as the competing labor organizations. Also included in the agreement were the following provisions which in pertinent part stated,

> 1. ELECTION . . . said 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, and provided further that rulings or determinations by the Regional Director in respect of any amendment of any certification resulting therefrom shall also be final.
>
> 6. OBJECTIONS, CHALLENGES, REPORTS THEREON . . . the Regional Director shall investigate the matters contained in the objection and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. . . . 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.

Subsequently, as provided by the foregoing agreement, the Regional Director prepared a notice of election and sample ballot describing the manner and conduct of the election to be held and sent copies thereof to the parties. According to the consent-election agreement the Respondent was to post this notice upon the request of the Regional Director at conspicuous and usual posting places easily accessible to the eligible voters. The sample ballot listed only the name of the Steelworkers as the labor organization for whom the voters could express a choice in the election, the failure to include the name of the IAM on the ballot resulting from the voluntary withdrawal from the representation proceeding of this labor organization on November 13, 1953. By a letter, dated the same day, all parties to this proceeding, were notified by the Regional Office of the IAM's withdrawal and the fact that its name would therefore not appear on the ballot in the scheduled November 19, 1953, election.

On November 16, 1953, counsel for the Respondent sent a letter to the Regional Director acknowledging receipt by the Respondent of the notices and sample ballots for posting, and receipt of a copy of the agreement bearing a red-penciled notation indicating withdrawal of the IAM from the election. The letter asserted that the exclusion of the IAM from the ballot constituted a material change in the terms agreed upon for the consent election as to which the only notice given the Respondent was the November 13, 1953, letter from the Regional Office received together with the foregoing notices. Accordingly, the letter concluded,

> Our client, Buffalo Arms, Inc., has directed us to notify you that, reserving all its rights in the premises, it protests and objects to the making of this substantial change in the terms and conditions of this election as agreed upon, to the manner of effecting the change, and to the failure to give due and adequate notice thereof to the employer as one of the parties to the agreement.

Subsequently the Respondent posted the notices of election and sample ballot issued by the Regional Director and simultaneously distributed a written document, dated November 18, 1953, to its employees requesting them to participate in the pending election, specifically pointing out that the choice they were to make in the election was whether they desired to be represented by the Steelworkers or by no union. In the election held on November 19, 1953, with only the Steelworkers on the ballot the following results were obtained as reflected by the official tally of ballots issued by the Regional Director.

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[2] The appropriate unit was described in the agreement as all production and maintenance employees including timekeepers, inspectors, leadmen, and lead inspectors, but excluding office clerical employees, guards, professional employees, the chief inspector, inspector foreman, and all other supervisors.

| | |
|---|---|
| Approximate number of eligible voters | 435 |
| Void ballots | 1 |
| Votes cast for Steelworkers | 243 |
| Votes cast against Steelworkers | 159 |
| Challenged ballots | 1 |

These statistics show that a majority of the valid votes were cast for the Steelworkers.

By letter to the Regional Director dated November 27, 1953, counsel for the Respondent indicated that on November 24, 1953, formal objection had been interposed on behalf of the Respondent to the conduct of the election for the reasons stated in counsel's November 16, 1953, letter to the Regional Director. In this letter counsel reiterated the view that the consent-election agreement contained certain material terms, and that this agreement might not have been reached on the basis of other terms; that the withdrawal of the IAM from the election constituted a material and substantial change in the terms of the agreement which was thereby voided. The letter further stated that the Regional Director's action in proceeding with the election in the manner detailed above without securing a new agreement from the interested parties as to the inclusion of only one labor organization on the ballot was an unauthorized and unwarranted act and that the election was therefore invalid.

On December 2, 1953, the Regional Director issued his report on objections in which he related the foregoing circumstances. The report also pointed out that when the Regional Director received the November 16, 1953, letter from Respondent's counsel protesting the listing of only the Steelworkers on the ballot he immediately, on November 17, 1953, called counsel and gave him an opportunity to withdraw the Respondent's consent to the election which he failed to do. The report went on to say,

> Furthermore the Employer posted the notices and collaborated in the running of the election, all of which indicated continued participation in the agreement for consent election. No question has been raised but that the conditions under which the election was conducted were such that the selection of Petitioner by a majority of the employees was a clear indication of their desire to be represented by the Petitioner for the purposes of collective bargaining. The undersigned therefore finds that the objections do not raise material issues with respect to the conduct or results of the election and so should be and hereby are overruled.

Having reached this conclusion, the Regional Director thereupon proceeded to certify the Steelworkers as exclusive representative of the Respondent's employees for the purposes of collective bargaining.

By letter to the Regional Director dated December 7, 1953, counsel for the Respondent took issue with the report on objections on the grounds that contrary to the report the Respondent had not been informed by notation on the notices of election received November 13, 1953, that the IAM had withdrawn from the election, and that counsel had not been given an opportunity by the Regional Director to withdraw the Respondent's consent to the election which he failed to do. The letter furthermore expressed the view that the report had ignored the crucial issue, namely that the consent-election agreement had been breached by a variance of a material term and that the election pursuant thereto was consequently a nullity. Moreover, counsel insisted that having protested the variance of the agreement before the election with full reservation of its rights, Respondent's posting of the required notices, advice to its employees to vote in the election, and its participation in the election may not be deemed a waiver of these rights.

On February 8, 1954, the Regional Director issued a supplemental report on objections in which he construed the foregoing letter as a request for reconsideration of the original report. The Regional Director stated in this supplemental report that he

> has carefully reconsidered the entire circumstances of this matter and concludes that there is merit in the position of the Employer; that the withdrawal request of the Intervenor without the express consent of the Employer voided the agreement for consent election and thus the election was invalid in that it was conducted without the existence of an agreement. The objection to the election of the Employer is therefore sustained, the Report on Objections issued December 2, 1953, is withdrawn, and the election is hereby set aside.

Accordingly, the Regional Director recommended to the Board that the certification of the Steelworkers as representative of the Respondent's employees included in the original report be revoked.

On February 12, 1954, the Steelworkers filed exceptions with the Board to the Regional Director's supplemental report on objections recommending revocation of its certification, and urged that (1) the Regional Director's report on objections and certification was final and binding and that the Regional Director has no power or authority in law to reverse this ruling after it has become final; and (2) that the Respondent by actively participating and affirmatively assisting in the election thereby indicated its consent to the election and cannot object to the form of the election agreement after the election has been held. On April 9, 1954, the Board issued an order disposing of the foregoing exceptions. In referring to the salient facts before it the order stated that the Respondent had received a formal notice from the Regional Office on November 16, 1953, apprising it of the withdrawal of the IAM from the election; that Respondent's counsel had protested this withdrawal to the Regional Director on November 16, 1953; that the Regional Director thereupon immediately communicated with counsel and extended to him an opportunity to withdraw Respondent's consent to the election; and that counsel refused to state unequivocally whether such consent would be withdrawn, but instead responded by another letter, reiterating the Respondent's protest to the change in the consent-election agreement and reserving its rights in the premises. The order noted that,

> Despite these protests and without utilizing its opportunity to withdraw from the consent election, the Employer proceeded to post notices of the election. Thereafter, on November 18, 1953, the day prior to the election, the Employer distributed to each employee a handbill in which it urged every eligible employee to vote, and admonished the employees to remember that "a majority of the valid ballots cast will determine the results of the election." [1]

[1] This handbill was signed by the vice president of the Employer.

In ruling on the exceptions a majority of the Board (Chairman Farmer and Member Peterson dissenting) held as follows:

> We find merit in the Petitioner's exceptions to the Regional Director's Recommendation for Revocation of Certification. The Board's rules make no provision for the withdrawal of a party from a consent election agreement, and we do not believe that in the circumstances of this case, the withdrawal of the Intervenor from the election requires us to invalidate the election and resulting certification.[2] Thus, whatever the basis for objecting to such withdrawal, it would appear that when the Employer, having been given an opportunity to withdraw from a consent election determines not to do so, but instead proceeds to post notices of the election and affirmatively encourages the employees to vote in such an election, such an employer has by its action, ratified the withdrawal of the Intervenor.[3] In accordance with this principle, we find that the Employer, with full notice of the changed conditions of the consent agreement has reaffirmed its acceptance thereof. It follows that the election was conducted with the consent of the Employer under a valid consent election agreement. We therefore reject the Employer's objections to the purely technical aspects of the consent election agreement. Moreover, we fail to see how the Employer was legally prejudiced by the holding of the election after the withdrawal of the Intervenor, as there is no contention that such withdrawal improperly influenced the results of the election.[4]

[2] See *Henry L Peirone, et als. d/b/a Alloy Manufacturing Co*, 107 NLRB 1201.

[3] Under similar circumstances, the Board has held that where an employer acquiesced to an election after being afforded an opportunity to withdraw therefrom, the employer indicated that he had waived and abandoned any claim that the consent election agreement covering such an election was invalid. *David Dankner, d/b/a Dankner Motor Sales*, 107 NLRB 1277, I. R. T. 17.

[4] See *Franklin County Sugar Company*, 97 NLRB 936, 927; *F. W. Woolworth Co.*, 96 NLRB 380, 382, *Henry L. Peirone, et als., supra.*

It was thereupon ordered that the Steelworkers' exceptions to the Regional Director's supplemental report be sustained, and that the Regional Director's original report overruling the Respondent's objections to the election and certifying the Steelworkers as exclusive bargaining representative be affirmed.

By telegram dated April 13, 1954, and by letter dated April 20, 1954, the Respondent excepted to the foregoing order of the Board which the Board regarded as a request for reconsideration of that order. On June 8, 1954, a majority of the Board (Chairman Farmer dissenting) issued an order denying request in which the Respondent's grounds for reconsideration were listed as (1) the Board had no authority to overrule the Regional Director's recommendation and (2) the Respondent had

not in fact been given an opportunity to withdraw from the election. Indicating that the Board had considered the request for reconsideration and the entire record in the case, and the conclusion having been reached that no new issues of fact or law had been raised not theretofore considered by the Board the order accordingly denied the Respondent's request for reconsideration.

The complaint alleges and the answer admits that the Steelworkers requested the Respondent to bargain with it as the representative of its employees concerning their terms and conditions of employment, and that the Respondent refused to comply with this request which first was made on December 10, 1953, and refused by the Respondent on December 14, 1953. As shown by the Respondent's letter to the Steelworkers dated December 14, 1953, this refusal was on the ground that the November 19, 1953, representation election and certification resulting therefrom were invalid. The complaint alleges and the answer admits a continuation of such bargaining request and refusal through June 11, 1954. The complaint further alleges that on June 14, 1954, the Respondent's employees went on strike in consequence of the Respondent's refusal to bargain with the Steelworkers. The answer acknowledges the existence of the strike and the Respondent stipulated at the hearing that it was caused by its refusal to honor the Steelworkers' certificate and to bargain pursuant thereto with the Steelworkers, but denies that such refusal was in violation of the Act.

The General Counsel contended at the hearing that the Steelworkers is the duly certified representative of the Respondent's employees, and that it was so certified on December 10, 1953, when it requested the Respondent to bargain with it; that the Respondent's refusal to honor that request, and its continued refusal to bargain with the Steelworkers is in derogation of its statutory duty under Section 8 (a) (5) of the Act. The General Counsel also contends that the underlying issues in this case as raised by the Respondent's defense have already been considered and resolved by the Board and are binding upon the Trial Examiner in this proceeding. In substance, the Steelworkers shares the General Counsel's position with stress on the argument that the Respondent's attack on the validity of the Board-conducted election which resulted in the Steelworkers' certification is precluded by its record of participation in that election. The Respondent's contentions as framed by presentation at the hearing and in its brief are these: (1) That in view of the alteration of the terms of the November 10, 1953, consent-election agreement without a further agreement of the Respondent, such consent-election agreement was void and the November 19, 1953, election pursuant thereto a nullity; that the Regional Director had no authority under the Act or the Board's Rules and Regulations to conduct such election; (2) that in accordance with the terms of the consent-election agreement, the Regional Director's determination that the consent-election agreement had been breached and that the resultant election and certification were invalid was final and binding on the Board; that the Board's authority to overrule the Regional Director's determination in a matter such as this exists only where it is shown that the Regional Director's action was arbitrary and capricious, and no such showing has herein been made; (3) the Board's April 9, 1954, order overruling the Regional Director's supplemental report on objections contains erroneous findings of fact which were not supported by the record before it, and that such findings prejudicially influenced the Board's decision in that order. Particularly, the Respondent takes issue with the Board's finding in the order that counsel for the Respondent had been given an opportunity by the Regional Director before the November 19, 1953, election to withdraw the Respondent's consent to the election which he failed to do, and that when the Respondent instead proceeded to post notices of the election and affirmatively urged its employees to vote it thereby ratified the withdrawal of the IAM from the election. The Respondent contends that it was not given such opportunity to withdraw from the consent election, and that its subsequent conduct did not amount to ratification of the change in the consent-election agreement. The Respondent compares its position with that of a party who, having been denied relief by the court on a jurisdictional question, litigates the merits but retains his right to question jurisdiction at the end of the trial and upon appeal.

Upon consideration of the record including the contentions of the parties, it is my conclusion that all the issues of fact and law on which I must rule before reaching the ultimate determination of whether the Respondent has violated the Act as alleged in the complaint have already been litigated and decided by the Board. Thus by its order of April 9, 1954, and by its order denying request of June 8, 1954, the Board, having before it the same evidence now before me and considering substantially the same legal questions as those raised in this proceeding, concluded that the Respondent's objections to the procedures leading to the certification of the Steelworkers as the exclusive bargaining representative of its employees were without merit, and

affirmed the validity of that certification. Because the Trial Examiner in these circumstances does not deem himself authorized to alter or depart from such findings and rulings by the Board [3] it is here necessarily found that the Steelworkers has been since December 2, 1953, and is now the certified exclusive bargaining representative of all employees of the Respondent in the appropriate unit hereinabove described in the consent-election agreement. It follows that the Respondent was statutorily obligated to honor the Steelworkers' status and to bargain with it upon its request with respect to terms and conditions of employment for the employees it represented. The Steelworkers made such request on December 10, 1953. When the Respondent refused on December 14, 1953, to comply with that request in derogation of its statutory obligation it violated Section 8 (a) (5) of the Act. It is further found that the Respondent has continued its refusal to comply with such request to bargain in violation of Section 8 (a) (5) of the Act and that the period of such violation includes the date June 11, 1954, as alleged in the complaint.

As noted, the Respondent's employees struck on June 14, 1954, in consequence of its refusal to bargain with the Steelworkers. At the hearing, counsel for the General Counsel and the Steelworkers requested the Trial Examiner to find, as alleged in the complaint, that the existing strike is an unfair labor practice strike and that the striking employees are therefore unfair labor practice strikers. While the Trial Examiner expressed doubt as to the efficacy or propriety of such findings in this proceeding, in the belief that they were beyond the scope of the refusal to bargain issue implicit in the Section 8 (a) (5) of the violation alleged in the complaint, reference to pertinent Board precedents [4] reveals not only the necessity here for these findings but recommendation of an appropriate order pursuant thereto. Accordingly, as it has been found that the Respondent's refusal to bargain with the Steelworkers was an unfair labor practice, it follows that the strike which was caused and prolonged thereby is an unfair labor practice strike, and hence that the striking employees are unfair labor practice strikers, and it is so found.

## 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, the Trial Examiner will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As the Respondent on or about December 14, 1953, and at all times thereafter refused and still refuses to bargain collectively with the Steelworkers as the representative of its employees in an appropriate unit, it will be recommended that the Respondent, upon request, bargain collectively with the Steelworkers, and in the event that an understanding is reached, embody such understanding in a signed agreement.

It has also been found that the strike by the Respondent's employees which was in progress at the time of the hearing was caused and prolonged by the Respondent's unlawful refusal to bargain. The striking employees were, therefore, entitled to reinstatement upon application, irrespective of whether or not their positions had been filled by the Respondent's hire of other employees. Accordingly, in order to restore the *status quo* as it existed prior to the time the Respondent engaged in the unfair labor practices and thereby to effectuate the policies of the Act it will be recommended that the Respondent shall, upon application, offer reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to all their employees who went on strike on June 14, 1954, or thereafter, dismissing, if necessary, any persons hired on or after that date. It is also recommended that the Respondent be ordered to make whole those employees who went on strike on June 14, 1954, or thereafter, for any loss of pay they may have suffered or may suffer by reason of the Respondent's refusal, if any, to reinstate them, by payment to each of them a sum of money equal to that which he normally would have earned as wages during the period from five (5) days after the date

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[3] *United States Gypsum Company*, 109 NLRB 1113.

[4] *Acme Brick Company*, 102 NLRB 173; *City Packing Company*, 98 NLRB 1261; *Rubin Brothers Footwear, Inc.*, 91 NLRB 10; *Julian Freirich Co.*, 86 NLRB 542; *Athens Manufacturing Company*, 69 NLRB 605; *American Bread Company*, 44 NLRB 970.

on which he applies for reinstatement, to the date of the Respondent's offer of reinstatement. Loss of pay shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289; *N. L. R. B.* v. *Seven-Up Bottling Company of Miami, Inc.*, 344 U. S. 344.

It is further recommended that the Board reserve the right to modify the back pay and reinstatement provisions herein if made necessary by circumstances not now apparent.[5]

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

CONCLUSIONS OF LAW

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

2. United Steelworkers of America, CIO, was on December 14, 1953, and has been at all times thereafter the exclusive bargaining representative of the Respondent's employees for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act in the following appropriate unit: All production and maintenance employees employed at the Respondent's Akron, New York, plant, including timekeepers, inspectors, leadmen, and lead inspectors, but excluding office clerical employees, guards, professional employees, the chief inspector, inspector foreman, and all other supervisors as defined in the Act.

3. By failing and refusing at all times since December 14, 1953, to bargain collectively with the Steelworkers as the exclusive representative of the employees in the foregoing appropriate unit the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) and 8 (a) (1) of the Act.

4. 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.]

[5] *Rubin Brothers Footwear, Inc., supra*, p. 16.

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HOMER CHEVROLET COMPANY [1] *and* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 376, AFL, PETITIONER. *Case No. 7-RC-2463. November 9, 1954*

## Decision and Order

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Emil C. Farkas, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

The Employer argues that because its business is local in character, the Board should decline to assert jurisdiction herein and should dismiss the petition. In opposition, the Petitioner contends that the Employer, as a franchised automobile dealer, is an integral part of a national distribution system. We find merit in the Employer's position.

The Employer is a franchised dealer of the Chevrolet Motor Division of General Motors Corporation and is engaged at Detroit,

[1] The name of the Employer, Don Homer Chevrolet Company, appears as set forth in the record.