

unloading, rigging, and erecting knockdown centrifugal compressor equipment and other heavy refrigeration machinery at the Baptist Memorial Hospital construction project in Jacksonville, Florida; and further finding from past conduct of Respondents that future continuance of such conduct is imminent, I shall recommend that Respondents cease and desist therefrom, and notify Carrier Corporation and Turner Transfer, Inc., that it has no objections to their hiring and employing workmen without regard to membership or nonmembership in Plumbers and Steamfitters Local Union No. 234, or any other labor organization, to perform the unloading, rigging, and erection of knockdown centrifugal compressor equipment and other heavy refrigeration machinery.

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

CONCLUSIONS OF LAW

1. Carrier Corporation and Turner Transfer, Inc., are employers within the meaning of Section 2 (2) of the Act.
2. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, A. F. of L., Plumbers and Steamfitters Local Union No. 234 is a labor organization within the meaning of Section 2 (5) of the Act; and C. L. Lipsey is its business agent.
3. By attempting to cause Carrier Corporation and Turner Transfer, Inc., to discriminate in regard to the hire or tenure of employment or other terms or conditions of employment of unnamed employees in violation of Section 8 (a) (3) of the Act, Respondent Union and Respondent C. L. Lipsey, its agent, have engaged in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.⁷
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.]

⁷ It is not alleged in the complaint nor contended by counsel for the General Counsel that conduct of the Respondents also derivatively constituted a violation of Section 8 (b) (1) (A) of the Act.

Cochran Co., Inc. and United Packinghouse Workers of America, Local No. 78, C. I. O. Case No. 20-CA-1029. June 28, 1955

DECISION AND ORDER

On January 18, 1955, Trial Examiner James R. Hemingway issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and is 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 made 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.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations

Board hereby orders that the Respondent, Cochran Co., Inc., Tracy, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Packinghouse Workers of America, Local No. 78, C. I. O., as the exclusive representative of all the Respondent's non-tomato-packingshed employees employed by the Respondent in its Tracy shed, excluding office clerical employees, guards, the shed foreman, the packing boss, the receiver, the maintenance man, the carloading boss, and all other supervisors as defined in Section 2 (11) of the Act with respect to rates of pay, wages, hours of employment, and other conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

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

(a) Upon request, bargain with United Packinghouse Workers of America, Local No. 78, C. I. O., as the exclusive representative of all the employees in the unit found herein to be appropriate and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its packingshed at Tracy, California, copies of the notice attached to the Intermediate Report and marked "Appendix."¹ Copies of such notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the Respondent's authorized representative, be posted 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.

(c) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

MEMBER RODGERS, dissenting:

I would dismiss the complaint in this case for want of jurisdiction. As I view the Respondent's operation of its packingsheds, it processes a substantial amount of produce which originates on its own farmlands or farmlands in which it has a substantial interest. Under such circumstances, I would find the packingshed employees to be agricultural workers and not subject to the Act. *Dofflemeyer v. N. L. R. B.*, 206 F. 2d 813 (C. A. 9).

¹ Said notice shall be amended, however, by substituting for the words "The Recommendations of a Trial Examiner" the words "A Decision and Order." In the event that this Order is enforced by decree of a United States Court of Appeals, there shall be further 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 AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon a charge filed on September 8, 1954, by United Packinghouse Workers of America, Local No. 78, C. I. O., herein called the Union, against Cochran Co., Inc., herein called the Respondent, the General Counsel for the National Labor Relations Board, the latter being herein called the Board, issued a complaint on October 15, 1954, alleging that the Respondent had engaged in and was engaging 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, as amended, 61 Stat. 136, herein called the Act.

With respect to the unfair labor practices, the complaint alleges that the predecessor of the Union was certified by the Board on December 9, 1953, as the collective-bargaining representative of employees of the Respondent in a certain described unit of packingshed employees and that at all times thereafter the said predecessor and/or the Union has been the collective-bargaining representative of the employees in said unit, that on about June 17, 1954, the Union requested the Respondent to bargain collectively with it in respect to rates of pay, wages, hours of employment, and other conditions of employment; and that on about July 6, 1954, and at all times thereafter, the Respondent refused to bargain.

The Respondent's answer, filed on October 25, 1954, denied that the Union was the successor to the union certified, denied the appropriateness of the alleged unit, denied the request and refusal to bargain, and alleged affirmatively that the employees employed in the alleged unit and on behalf of whom the Union requested the Respondent to bargain are agricultural employees. The affirmative portion of the answer also alleged that the unit described in the complaint was improper and contrary to law because: (1) The employees in it are employed as agricultural laborers; (2) it is composed partly of employees subject to the provisions of the Act and partly of employees exempt from such Act by Section 2 (3) thereof; and (3) it contains unrelated groups of employees, some of whom were not permitted to vote on whether they desired the Union to represent them for the purpose of collective bargaining.

Copies of the charge, complaint, and notice of hearing were duly served upon the parties, and on November 16, 1954, a hearing was held at San Francisco, California, before me as the duly designated Trial Examiner. The Respondent was represented by counsel and the Union by field representatives. Full opportunity was afforded the parties to participate in the proceedings. Early in the course of the hearing, the Respondent moved to dismiss the complaint on the ground that the employees involved were agricultural employees exempt from the Act. Ruling was deferred until all evidence on that aspect of the case was in, but after such evidence was in, the Respondent requested that its motion be ruled on by the Trial Examiner in the Intermediate Report. It is now denied for the reasons hereinafter set forth. At the close of the hearing, opportunity was afforded the parties to argue orally. Only the General Counsel did so. The Respondent requested and was granted time in which to file a brief. Time was given and later extended. On December 17, 1954, a scholarly brief was received from the Respondent and it has been considered. No other briefs were filed.

From my observation of the witnesses, and upon the entire record in the case, I make the following:

FINDINGS OF FACT

I JURISDICTIONAL FACTS

A. *The business of the Respondent*

The Respondent, a California corporation organized under the laws of the State of California in 1947, has its principal place of business at Tracy, California, with packingsheds on locations leased, at Tracy, from the Southern Pacific Railroad and, at Rhodes Station, California, from the Western Pacific Railroad. From these packingsheds the Respondent, in the course of its business, causes tomatoes, carrots, celery, and other vegetables, valued in excess of \$100,000 annually, to be sold and transported in interstate commerce to States other than the State of California. The Respondent admits such jurisdictional facts. I find, therefore, that the Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

B. *The effect of the agricultural rider to the Act*

1. The Respondent's property interests and employment practices

The Respondent owns a ranch of 310 acres, and it has an interest in a number of leasehold acres. The greater part of the leasehold acreage is held jointly under leases to the Respondent and 1 of 3 individuals. Such land, exclusive of the property on which the packingsheds are located which is held by the Respondent alone, totals approximately 4,000 acres. The Respondent has an arrangement with each of the three individuals mentioned which it calls a partnership agreement.¹ Under these agreements, each of the three individuals has the management of a certain number of acres, varying from 500 to 2,000, including those leased jointly to him and the Respondent. He hires and pays the permanent farmhands and supervises their work. The harvesting hands are acquired through a licensed contractor of such labor. The Respondent pays the harvesting hands. Before hiring the foreman of the harvesting hands the Respondent consults the individual manager, or partner, about him, and the ranch manager consults the Respondent about farmhands that he hires. The manager and the Respondent agree on crops to be grown—other, presumably, than asparagus, which is permanent. Approximately half of the total acreage is in asparagus. The customary remaining crops are tomatoes, celery, alfalfa, beans, barley, carrots, and onions. These crops, after passing (with certain exceptions) through the Respondent's two packingsheds, are sold by the Respondent, who keeps separate books on each partnership interest. The cost of farm labor, regardless of who pays for it initially, is charged as a cost. The Respondent charges each partnership with the cost of packing, cooling, or other necessary handling at the packingsheds and with other costs of marketing the crops. The net proceeds of each partnership operation are divided by the Respondent and the respective partners.

The two packingsheds are operated exclusively by the Respondent. It alone leases the premises, hires and supervises all the help, and pays their wages. These proceedings are concerned solely with the Tracy shed. The partnership acreage is located north, east, and south of this shed, at a minimum distance of 2 miles and a maximum of 20 miles. Tomatoes are packed at both the Rhodes and Tracy sheds, but virtually all the celery and asparagus pass through the Tracy shed. The Tracy shed does not handle onions, carrots, or other vegetables. The celery is cut and trimmed in the field, placed in field crates, loaded on motortrucks, and hauled to the Tracy shed. The hauling is done in the Respondent's own trucks. At the Tracy shed the celery is inspected for defects or damage, is washed by means of a series of sprays, crated according to size, lidded, and loaded on railroad cars. Except when the celery is brought to the shed too fast to be handled, it takes only about 10 or 15 minutes from the time it is received until it is loaded on cars. To maintain its freshness, celery is normally packed and loaded within 2 or 3 hours of the time it is cut. As there are no other growers of celery in the area, the Respondent does not pack that commodity for others. In addition to the 700 to 825 acres of tomatoes grown on the partnership lands, the Respondent packs at its sheds tomatoes grown by others on about 20 acres.

Of the total amount of fresh asparagus sold by the Respondent, about 40 percent is grown on the ranches managed by 1 or more of the 3 individuals with whom the Respondent has a so-called partnership agreement. The rest is grown on land in which the Respondent has no interest. About 80 percent of that grown by others is handled by the Respondent on a consignment basis and is sold for a commission; the rest is purchased outright by the Respondent for resale. The Respondent employs a sales manager to handle the sale of all perishable items. Sales are made in the name of the Respondent alone and remittances by check are made payable to the Respondent. The largest buyers of the Respondent's fresh vegetables are the larger chain grocery stores, whose representatives come direct to the Respondent's sheds to make their purchases. Sales to large wholesale jobbers in the Midwest, East, and in Canada are made by telephone. Vegetables for canning are sold direct to the large canneries.

All the fresh asparagus which the Respondent ships is commingled in the cars, sorted according to size and color, and sold together without regard to source, whether from its partnership ranches or consigned by others. The total value of the asparagus grown in 1 year on land in which the Respondent has an interest is approximately \$636,000. Of this, it sells about two-thirds to canneries and ships about one-third

¹ In view of the legal objections to a true partnership between a corporation and another (see Robert S. Stevens, *Handbook on the Law of Private Corporations*, West Publishing Co., Sec. 58, and cases there cited), the Respondent's arrangement might better be called by another name, but for convenience it will be so called herein.

(or \$212,000 worth) fresh, about 90 to 95 percent of it being shipped out of the State. The value of the fresh asparagus which is grown by others but which the Respondent sells would, therefore, be about \$318,000. Only the fresh asparagus passes through the Tracy shed. The boxing is all done in the field, but before the fresh asparagus is shipped it is taken to the Tracy shed, where it is put through the cooler where water at 33- or 34-degree temperature is run over the crated asparagus for 18 minutes. It is then loaded on railroad cars.

Fresh asparagus is shipped from the Tracy shed between February and April. From May to July it is sold to canneries. Tomatoes are packed and shipped in September and October, while celery is packed and shipped from November to January. When commodities are not passing through the Tracy shed, it is used for storage.

Employees at the Tracy shed are hired exclusively by the Respondent. A maximum of about 100 employees work there during the celery or tomato seasons. About 24 or 25 are employed during the asparagus season. Some are local residents, others are transient workers. Local workers will sometimes carry over from 1 crop season to the next or from 1 year to the next. Transient workers usually move on after work is finished on one crop. The intervals of time between certain crops, especially the long interval after the asparagus season, tends to discourage continuity of employment. Tomato packers are semiskilled, whereas the celery packers and asparagus handlers are not. As the tomato season runs into the celery season, some of the local help will continue on in celery, but others choose not to do the unskilled work. Roughly a third (varying more or less from that proportion from year to year) of the celery workers may continue in asparagus the following season. Some of the asparagus handlers employed at the shed work at a sugar factory during the summer and fall and therefore will not work for the Respondent on other crops. The result of all this is a fairly high labor turnover.

At the beginning of the asparagus season in February, before the work becomes heavy, the Respondent's truckdrivers and their swampers haul asparagus from 4 to 8 miles from the fields and then occupy their spare time putting the asparagus through the cooler and loading it in the cars. As more of the time of the truckdrivers is taken up with hauling, around April, the Respondent hires a crew for the shed. Aside from the truckdrivers, there appears to be no interchange of work among employees. Those that work at the Tracy shed do not work in the fields and those that work in the fields do not work at the shed. Separate payrolls are kept, not merely because the rate of pay of the shed employees is different from that of the field employees, but also because the shed employees are employed exclusively by the Respondent, while the cost of field labor is charged to the several partnership accounts. During the slack period between mid-July and mid-September and again in part of January and February the only employees employed by the Respondent at the Tracy shed are the maintenance man and foreman.

2. Conclusions respecting character of labor employed

The contention of the Respondent that the Board does not have jurisdiction because the employees involved are agricultural employees would not have required new consideration, in view of the Board's assumption of jurisdiction in the representation case,² if it were not for the supervening decision of the Ninth Circuit Court of Appeals in *Dofflemyer v. N. L. R. B.*, 206 F. 2d 813, where the court, on facts bearing some similarity to those in the case at hand, refused to enforce the Board's order and found the packingshed employees in that case to be agricultural employees. It is not the mere fact that the employees work in a food-packing shed that determines whether or not they are agricultural laborers, for decisions are to be found holding such employees to be either agricultural or not depending on the other circumstances of the case. If a food processor, having no farming interests, operated a packingshed as an incident to transferring crops to his processing plant, opinions probably would not differ that the employees of the packingshed would be considered nonagricultural. And if a farmer has a packingshed on his farm in which he prepares crops for market as an incident to his farming operations, opinion probably would not differ that the farmer's employees who worked only in the shed would nevertheless be agricultural laborers. The difficulty of determining the category into which the employees should be placed arises in cases falling in the twilight zone between those in the examples. In proportion to the degree to which additional facts remove the case from the clear outer margin are opinions likely to differ on whether the packingshed employees are or are not agricultural workers. As the determination of the matter is only by opinion, however, it is

² *Cochran Co., Inc.*, 105 NLRB 5

never possible to be as certain as it is to determine which additional straw resulted in breaking the proverbial camel's back. Much of the uncertainty lies in the area where the operator of the packingshed is not, himself, the tiller of the soil, although he has some basis for claiming to be a farmer, or where a farmer conducts a separate business to which the packingshed is just as much an incident as it is to farming operations. Even the definition provided in section 3 (f) of the Fair Labor Standards Act which, under its appropriation rider, the Board is obliged to follow, fails to remove the uncertainties. To the extent material here, that section reads:

"Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil . . . the production, cultivation, growing and harvesting of any agricultural . . . commodities . . . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Since the Respondent's Tracy shed is located from 2 to 20 miles from the several ranches or farms here involved, the practices performed in such shed are obviously not performed on a farm. The question for determination here, then, is whether or not the operation of the Tracy shed comes within the foregoing definition as practices performed by a farmer incident to or in conjunction with such farming operations. This question requires a preliminary determination of whether or not the Respondent is a "farmer." If so, it must then be determined whether or not the practices conducted at the Tracy shed are incident to the Respondent's farming operations rather than to its other operations. Section 3 (f) of the Fair Labor Standards Act enumerates some of the acts involved in farming, such as cultivation and tillage of the soil, and the production, growing, and harvesting of agricultural commodities. Anyone who, himself, performs such acts for the profit expected from the crops would, without question, be called a farmer. However, if the owner of the farm is prosperous enough to hire others to perform those acts for him, he could still be called a farmer. On the other hand, one who merely owns the land and rents it to another for use as a farm would not be considered a farmer. Intermediately, there are interests in farms which may or may not be deemed sufficient to make one a farmer. Whether or not the owner of a farm who, instead of demanding a fixed rent from the land, agrees to take a share of the crops as rent could be called a farmer, one who participates in the actual operation of the farm, would, at least at some degree of participation, come within the definition of farmer. Here the Respondent is a joint lessee of most of the land farmed and is owner of a portion, it shares in expenses of operation, and consults with each of the three so-called partners in regard to certain personnel and the crops to be grown. The actual management and operation of the farm, however, is in the hands of 1 of those 3 so-called partners. The exact nature of the Respondent's "consultation" with the partners is not shown. It does not appear whether the factor determining the amount of acreage decided to be allotted to any particular crop is the Respondent's judgment of the quantity of each vegetable that it thinks it can sell profitably or the partner's judgment of what acreage can be allotted in view of rotational needs or other factors. In other words, the consultation may be such as would be usual between joint farmers or it may be such as would occur between a farmer and his selling agent.³

If the Respondent had no separate business and were concerned only with the operation of the farms, an inference might be warranted that the Respondent participates in the farm management from the standpoint of a farmer. But since it has a separate business as a commission agent, its perspective is not necessarily that of a farmer, and its participation in conferences with the farm-managing partner could be in its capacity as such selling agent. The joint leases are some evidence that the Respondent is a cofarmer, but such leases could be made in such form for no other reason than that the actual farm manager has insufficient capital to lease so large an acreage by himself and, as the Respondent has a market for a larger quantity of vegetables than the farm manager could raise on his own capital, the Respondent might have induced the farmer to execute a joint lease with it for a larger acreage, to the mutual advantage of the farmer and the factor, as the former would be able to grow more and the latter would be able to supply a larger market.

Much of the evidence suggests that the position of the Respondent in the so-called partnership arrangements is that of a financial backer. But there is also evidence of a degree of participation in the farm management by the Respondent which might be deemed enough to characterize it as a farmer. This is found in its participation in the decision concerning what crops to grow, consultation concerning hiring of

³ See *Antle Carrots, Inc.*, 110 NLRB 741.

certain ranch hands, and the making of arrangements for hiring harvesting hands, as well as its sharing of expenses of operations. Not entirely without some doubt, I believe this participation, coupled with the Respondent's interest in the land itself, is sufficient to make the Respondent a farmer within the meaning of the Fair Labor Standards Act.

However, to determine the character of the employees of the Respondent at the Tracy packingshed, it is essential not only that the Respondent be a farmer but also that operations of the shed be an incident to, or that the work done there be in conjunction with, the Respondent's farming. Unlike the situation in the *Dofflemeyer* case, the shed here is operated not by the farming partners but by the Respondent individually. If the Respondent were operating the Tracy shed only as a farmer in conjunction with its farming operations, it would be immaterial that it operated the shed individually rather than in partnership with its farming partners. The question thus is, does the Respondent operate the shed as an incident to its farming operations or in conjunction with its separate commission business? Although the fact that the Respondent operates the shed alone is not controlling in a determination of the question, that fact is to be considered as significant, for if the Respondent had no separate business, it would have no apparent reason for operating the shed by itself. But the Respondent does carry on a separate business at the Tracy shed. It has an office there through which it conducts its selling business, a business not limited to selling its own produce. Sixty percent of the asparagus passing through the shed is grown on land in which the Respondent has no interest. It sells some of this asparagus on commission and buys some for resale on its own account. The Respondent does not sell any celery grown on land in which it has no interest, but this is because no one else in the area grows any celery. Only a negligible proportion of the tomatoes packed at the Tracy shed and sold by the Respondent are grown elsewhere than on land in which the Respondent has an interest. It does not appear whether or not more tomatoes grown by others would be available to the Respondent if it is desired them. The Respondent, in its brief, concedes that the employees engaged in cooling and loading asparagus for others are not agricultural laborers. But the same employees handle asparagus grown on the so-called partnership ranches and such asparagus is commingled and handled with that of others; so it would be impossible to exclude such employees on a part-time basis. Since all the celery handled at the Tracy shed is grown on land in which the Respondent has a partnership interest, the same difficulty would not exist. But I believe the test of agricultural labor here to be not where the produce is grown but whether the shed is operated as an incident to the partnership farming operations or as a separate business. Even if the Respondent handled only produce grown on partnership ranches, it could still operate a packingshed as incident to a separate business. The Respondent's Tracy shed is operated exclusively by it for its own profit. It, alone, leases the premises, hires and pays the employees, and handles the sales. Sales of the fresh produce are handled by the Respondent's sales manager, whose office is at the shed. All sales are made in the Respondent's name and checks are payable to it alone. The identity of the produce of such partnership operation is therefore not maintained. Since remittances are made payable to the Respondent the funds would go into the Respondent's account and the Respondent would settle with its so-called partners on a bookkeeping basis. The cost of packing and of selling is charged to each partnership interest before the net amount due is determined. The record is not clear as to what items the selling costs actually include. The inference is that each partnership is charged with the cost of packing and selling like anyone else for whom the Respondent might sell produce. One of the items presumably involved in the cost of selling is the Respondent's commission. The shed is used by the Respondent not only to house its commission-business offices and to pack, cool, load, or otherwise handle produce, but also as a place where prospective buyers may make their inspection and consummate their purchases of produce regardless, apparently, of who grew it. On all the evidence, I conclude and find that the Respondent operates its Tracy shed as a business separate and apart from its farming interests.⁴ This being so, the employees there employed are nonagricultural, regardless of what produce they handle. Jurisdiction, therefore, should be assumed

II THE ORGANIZATION INVOLVED

The Union is a labor organization admitting to membership employees of the Respondent.

⁴ See *Antle Carrots, Inc.*, *supra*. In this respect, the facts differ from those in the *Dofflemeyer* case.

Before 1954 the Congress of Industrial Organizations had in its organization what were known as local industrial unions which were chartered directly by the CIO without their being affiliated with any national or international union. Local Industrial Union No. 78, C. I. O., was such an organization. Its constitutional jurisdiction covered all workers involved in the handling and processing of fresh fruits and vegetables, with a territory covering roughly the States of California and Arizona. In the early part of 1954 the CIO decided to eliminate local industrial unions as separate organizations and it gave notice to all its international unions that industrial unions were to be transferred to international unions and the latter were given an opportunity to lay claim to any industrial unions which they believed would come within their jurisdiction. The United Packinghouse Workers of America was the only union to lay claim to Local Industrial Union No. 78. The CIO informed the latter of its desire that the local should go into the Packinghouse Workers union, but it was to decide this for itself in a referendum. Other industrial locals were taken over by internationals without such formality. Local Industrial Union No. 78 gave notice to such of its members as it could reach that a vote would be taken. This notice was given to all who were then working in the commodities of the spring season and to all local residents whose address the organization had. In addition, notice was broadcast in some instances by radio. Voting took place by districts starting in late April and continuing almost through June 1954. In the district in which Tracy was located, five elections were held, including the one at Tracy. Votes were cast by an estimated 3,000 members.⁵ The result was an almost unanimous approval by those voting of affiliation with the United Packinghouse Workers of America, C. I. O. The old charter was surrendered and a new charter was issued to the Union as Local 78 by the United Packinghouse Workers of America, C. I. O., on July 1, 1954. After an audit and check was made, the properties and contracts of Local Industrial Union No. 78, C. I. O., were transferred to the Union, which assumed all liabilities of the former. From the standpoint of internal union affairs the Union is not disputed to be the successor of Local Industrial Union No. 78, C. I. O. The effect of the successorship on the certification will be taken up later herein.

III. THE UNFAIR LABOR PRACTICES

A *Refusal to bargain*

1. The appropriate unit

In a representation case, decided on May 26, 1953 (20-RC-2049), the Board determined that all non-tomato-packingshed employees employed by the Respondent in its Tracy shed, excluding office clerical employees, guards, the shed foreman, the packing boss, the receiver, the maintenance man, the carloading boss, and all other supervisors as defined in Section 2 (11) of the Act, constituted a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act.⁶ The Respondent, in its answer, denied that this unit is appropriate. No evidence that was not, or could not be, introduced at the representation hearing was adduced at the hearing in this case to prove that the unit was not appropriate. The Respondent's objection is that different employees handle different types of produce and should not be included in a single unit. This has not been considered a proper objection by the Board in such cases as this and was not so considered here. It is not my province to substitute my opinion for that of the Board where the Board has already determined the appropriate unit and no new evidence is offered. I therefore find that the unit found by the Board to be appropriate in the representation case has at all times material herein been appropriate within the meaning of Section 9 (b) of the Act.

2. The Union's majority

Following an election held in the aforesaid representation case,⁷ the predecessor to the Union was certified on December 9, 1953, as 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.

⁵ As of March 1954 Local Industrial Union No. 78 had a membership of about 17,000 most of whom paid dues only for 1 or 2 quarters of the year.

⁶ *Cochran Co., Inc., et al., supra*

⁷ The tally of ballots shows that of approximately 126 eligible voters, 94 cast ballots, 4 of which were challenged. Of the balance, 83 votes were for the predecessor of the Union and 7 were against.

It is the Respondent's contention that the Union is not the successor to the certified union or at least has no right to succeed to the certification of Local Industrial Union No. 78. The right of a union to require bargaining on the basis of a certification of a union to which it claims successorship is a matter which is not usually tendered for initial consideration in an unfair labor practice proceeding. The question is more frequently raised in representation proceedings⁸ or in a supplemental proceeding, such as on a motion to amend a certification⁹ or on a notice to show cause why the name of the union (after it voted to affiliate with another organization) should not be changed in the Board's order.¹⁰ However, I see no objection to having the matter decided in the same unfair labor practice case that raises the question of a refusal to bargain. The question here is not which of two factions of a union, in which there has been a schism, represents the employees in the appropriate unit, a question which would be better decided in a representation proceeding. The question here is whether the Union is the same organization with only external changes in appearance or whether it is a new organization. If the employees' own organization remains the same, a change in name only is immaterial.¹¹ A change of affiliation is little more than a change in name. It is true that, in changing its affiliation, Local Industrial Union No. 78 surrendered its charter to the C. I. O. and received a new one from the international union. But this is a formality that would be necessary in any change of affiliation. It does not affect the continuity of the internal organization.¹² All assets of the original local were assigned to the rechartered local, all obligations of the former were assumed by the latter, memberships were continued without formality, and contracts made on behalf of employees by the original local continued to be administered by the Union.

The Respondent points to the fact that the election which was held was a general one for all members and that, because such members were employees of many employers, the election was indecisive for employees of the Respondent. If the certified union had been limited to employees of the Respondent before the change in affiliation but had been expanded to embrace employees of many employers, the Respondent's argument might find some support.¹³ But Local Industrial Union No. 78 was not limited to employees of the Respondent or to the unit found appropriate, and the change in affiliation did not bring in additional members. Hence, the members of the certified union were not obliged to share their assets or their autonomy with new groups. Except for dissenting opinions, the Board has not deemed even a merger with new groups to have the effect of terminating the representative status of the union involved.¹⁴

In *Cadillac Automobile Company of Boston*, 90 NLRB 460, employee-members in the automotive field, who had been represented by a local union which included other types of employees, petitioned the parent organization for a charter as a separate local. The charter was granted, and all members of the original local who were in the automotive field were transferred to the new local, the first local continuing to function separately. The motion of the two locals to amend the certification of the first local by substituting the number of the new local was granted by the Board although there was no evidence that the employees in the unit had voted on the question of separation from the original local. A perusal of the cases previously cited indicates that the Board has generally taken the position that a mere change in affiliation is a matter of internal union affairs in which neither the employer nor the Board has any interest.

The Respondent may argue that, in the *Cadillac* case, the transfer of membership and of representation to the new local was initiated by members of the original local and that no presumption of approval by the employee members should be indulged in where the movement for the change is initiated from outside the local.¹⁵ It is true that the movement for a reaffiliation of Local Industrial Union No. 78 was initiated by the C. I. O., which expressed its intention to put its children out for adoption.

⁸ *Ex gr., Gelatin Products Company*, 49 NLRB 173; *Fuld & Hatch Knitting Company*, 67 NLRB 1059; *Carson Pirie Scott & Company*, 69 NLRB 935; *Charles Beck Machine Corporation*, 107 NLRB 874; *Cleveland Decals, Inc.*, 99 NLRB 745 (petition for decertification); *Prudential Insurance Company*, 106 NLRB 237 (employer's petition); *R C Williams & Company*, 107 NLRB 933

⁹ *Ex gr., Missouri Service Company*, 87 NLRB 1142; *Cadillac Automobile Company of Boston*, 90 NLRB 460

¹⁰ *Harris-Woodson Co., Inc.*, 85 NLRB 1215

¹¹ *Continental Oil Company v. N. L. R. B.*, 113 F. 2d 473 (C. A. 10)

¹² See *R C Williams & Company*, *supra*

¹³ See *Dickey v. N. L. R. B.*, 218 F. 2d 652 (C. A. 6).

¹⁴ *Missouri Service Company*, *supra*

¹⁵ As for example in *Cleveland Decals, Inc.*, *supra*

But members of that local were given an opportunity to vote on the matter. Notice of such voting was given in as effective a manner as possible where the membership consists of a large proportion of transient workers. The voting was not a hurried affair but covered several months. Following notice, an election was conducted, among other places, in the town of Tracy, California, where the Respondent has its shed. There is no showing that any bylaw of Local Industrial Union No. 78 required approval by a majority of all members of the local for the action contemplated. Presumably, therefore, a majority of those voting would decide the question. So far as appears from the record no protest was made by any member and no member has attempted to perpetuate Local Industrial Union No. 78. On all the evidence, I find that the Union is the successor to the certified union and is entitled to succeed to its certification. Consequently, I find that the Union is the representative of all the employees in the appropriate unit within the meaning of Section 9 (a) of the Act.

3. The request and refusal to bargain

No issue is raised on the request and refusal to bargain. The Union's letter requesting bargaining is dated June 17, 1954. On July 6, 1954, the Respondent replied by its attorney declining to bargain on the ground that, under the *Dofflemyer* decision of the Ninth Circuit Court of Appeals, the Board lacked jurisdiction. As I have heretofore found that the Board has jurisdiction, I find that at all times on and after July 6, 1954, the Respondent has refused to bargain with the Union as the exclusive representative of all the employees in the appropriate unit, 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 operation of the Respondent's business 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

Since I have found that the Respondent has committed an unfair labor practice in refusing to bargain with the Union, I shall recommend that it cease and desist from such conduct and I shall recommend that the Respondent, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning wages, hours, and working conditions and that, if an understanding is reached, the Respondent embody such understanding in a signed agreement.

The Respondent's refusal to bargain, based on a good-faith misconception of the law, does not presage a danger in the future of the commission of other conduct forbidden by the Act. I shall, therefore, recommend that the Respondent cease and desist only from the conduct herein found to be an unfair labor practice and from any like or related acts.

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

CONCLUSIONS OF LAW

1. The employees in the appropriate unit described below are employees within the meaning of Section 2 (3) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. All non-tomato-packingshed employees employed by the Respondent in its Tracy shed, excluding office clerical employees, guards, the shed foreman, the packing boss, the receiver, the maintenance man, the carloading boss, and all other supervisors as defined in Section 2 (11) of the Act, constitute, and at all times material herein have constituted, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. At all times since December 9, 1953, the certified union, together with the Union as its successor, has been, and the Union now is, the exclusive representative of the employees in the above-described appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

5. By failing and refusing on and after July 6, 1954, to bargain collectively with the Union as the exclusive representative of the employees in the above-described appropriate unit, the Respondent has engaged in unfair labor practices within the meaning of Section 8 (a) (5) and (1) 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 bargain collectively, upon request, with United Packinghouse Workers of America, Local No 78, C. I. O., as the exclusive representative of all our employees in the bargaining unit, described below, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, we will embody such understanding in a signed agreement. The bargaining unit is:

All non-tomato-packingshed employees employed at the Tracy shed, excluding office clerical employees, guards, the shed foreman, the packing boss, the receiver, the maintenance man, the carloading boss, and all other supervisors as defined in the Act

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement made in conformity with the proviso to Section 8 (a) (3) of the Act.

All our employees are free to become or remain members of United Packinghouse Workers of America, Local No. 78, C I O., or any other labor organization or to refrain therefrom except to the extent that membership in such organization may be required as a condition of employment by the terms of an agreement made as authorized in Section 8 (a) (3) of the Act

COCHRAN CO , 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.

Footo Mineral Company and United Steelworkers of America,
CIO. Case No. 11-CA-770. June 28, 1955

DECISION AND ORDER

On February 24, 1955, Trial Examiner John H. Eadie, 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. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices and recommended that the complaint be dismissed in that respect. Thereafter the Respondent filed exceptions to the Intermediate Report.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Inter-