

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 set forth 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 thereof.

V. THE REMEDY

Since it has been found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, I will recommend that they cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

The Trial Examiner has found that the Respondent discriminatorily laid off James E. Davis and has since failed to reinstate him. I will recommend that the Respondent offer James E. Davis immediate and full reinstatement to his former or substantially equivalent position, and make him whole (in accordance with the formula set out in *F. W. Woolworth Company*, 90 NLRB 289) for any loss of pay which he may have suffered by reason of the Respondent's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from June 28, 1958, to the date of the Respondent's offer of reinstatement, less his net earnings during said period. It will also be recommended that the Respondent, upon reasonable request, make available to the Board and its agents all payroll and other records pertinent to an analysis of the amount due as backpay.

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. Local Union No. 282, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of the Act.
2. By discriminating in regard to the hire and tenure of employment of James E. Davis, thereby discouraging membership in Local No. 282, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and interfering with, restraining, and coercing its employees in the exercise of their rights under Section 7 of the Act, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
3. 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.]

Whaley Coal Company and Scott County Miners Union, Petitioner. *Case No. 9-RC-3683.*¹ *October 1, 1959*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Clifford L. Hardy, 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:

1. The Employer is engaged in commerce within the meaning of the Act.
2. The labor organizations involved claim to represent certain employees of the Employer.²

¹ Case No. 9-RC-3683, which was consolidated with *Snyder & Randolph, Inc.*, 9-RC-3684, for the purposes of hearing, was severed for purposes of decision.

² The Intervenor, District 19, United Mine Workers of America, declined to stipulate that the Petitioner is a labor organization within the meaning of the Act. As the record

3. A question affecting commerce exists concerning the representation of employees within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

4. The appropriate unit:

The Petitioner seeks a unit of all employees at the Employer's mine at Fonde, Bell County, Kentucky, including a truckdriver carried on the Employer's payroll, but excluding truckdrivers who haul coal under independent contracts with the Employer, office clerical employees, professional employees, guards, and all supervisors as defined in the Act. The Employer agrees to the appropriateness of this unit. However, the Intervenor urges that truckdrivers who haul under independent contracts with the Employer are employees within the meaning of the Act who should be included in the unit.

The truckdrivers in question, whose services are obtained under independent contracts with the Employer, haul coal from the Employer's mine tippie to a railroad siding where it is loaded on coal cars for shipment to customers. These individuals, unlike the truckdriver on the Employer's payroll, are paid on a tonnage basis for coal hauled and hire men to drive their trucks when necessary. The Employer carries no insurance covering the operation of their trucks and makes no workmen's compensation tax payments for these truckdrivers. Moreover, the record fails to establish that the Employer withholds any social security or income taxes for these individuals, or that the Employer extends any of its employees' terms and conditions of employment to these truckdrivers. In view of the foregoing and the entire record, we find that the truckdrivers who haul coal under independent contracts with the Employer are independent contractors and not employees within the meaning of the Act. We shall therefore exclude them from the unit.³

Accordingly, we find that all employees at the Employer's mine at Fonde, Bell County, Kentucky, including the truckdriver carried on the Employer's payroll, but excluding truckdrivers who haul coal under independent contracts with the Employer, office clerical employees, professional employees, guards, and all 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.

5. At the time the instant petition was filed on June 8, 1959, the Intervenor was not in compliance with the filing requirements of Section 9(f), (g), and (h) of the Act. However, on September 14, 1959, Public Law 86-257, 86th Congress, cited as the "Labor-Management Reporting and Disclosure Act of 1959," was enacted. Section 201(d) of that statute repealed the provisions of Section

discloses that the Petitioner exists for the purpose of dealing with employers concerning wages, hours, and other conditions of employment of employees, we find that it is a labor organization in the statutory sense.

³ See *Cement Transport Inc.*, 111 NLRB 175.

9(f), (g), and (h), effective September 14, 1959. The repeal raises a question concerning the effect to be accorded to election results in this and other representation cases involving noncomplying *intervenors* who are successful in representation elections conducted after the repeal but which are based upon petitions filed prior thereto.

Subsequent to the passage of Section 9(f), (g), and (h) in 1947, the Board announced that labor organizations would be permitted to intervene in representation proceedings notwithstanding their non-compliance with that section. However, such intervention was limited to advancing contract-bar and related contentions,⁴ and participation in the elections which were directed was not allowed. In 1958, the Supreme Court directed the Board in *Bowman Transportation Company*⁵ to devise election procedures whereby noncomplying unions which had been unlawfully assisted by employers could establish their majority status in a Board-conducted election in which the arithmetic results, rather than the unions, would be certified. While the thrust of this decision was to enable these unions to demonstrate in complaint cases that the effects of their unlawful assistance had been dissipated, and to qualify as exclusive bargaining representative without being certified,⁶ the Board construed the *Bowman* decision to have undermined its previous rule denying to noncomplying intervenors a place on the ballot in representation cases. Accordingly, we announced in *Concrete Joists & Products Co., Inc.*⁷ and other contemporary decisions⁸ that noncomplying intervenors could henceforth participate in representation elections but, if successful therein, the Board would merely certify the arithmetic results rather than award a certificate to those labor organizations.

In applying this new rule to cases since *Concrete Joists*, the Board took cognizance of the fact that a representation case is a continuing proceeding. While it commences with the filing of a petition, it does not normally culminate until an election has been conducted and the successful labor organization has been certified, or a certificate of results has issued following rejection of union representation by the voters. Because of the continuing nature of these proceedings, the Board decided that no useful purpose would be served by certifying the arithmetic results rather than the noncomplying intervenor if such a union actually achieved compliance by the time the proceeding terminated. Therefore, the Board announced that noncomplying intervenors would not only be permitted to participate in representation

⁴ E.g., *General Electric Company (Medford Plant)*, 85 NLRB 150; *Westinghouse Electric Corporation*, 87 NLRB 463; *Sterling Faucet Company*, 119 NLRB 1225.

⁵ *N.L.R.B. v. District 50, United Mine Workers of America*, 355 U.S. 453.

⁶ The Supreme Court, in *United Mine Workers of America v. Arkansas Oak Flooring Co.*, 351 U.S. 62, had previously ruled that Congress did not make the filing requirements of Section 9(f), (g), and (h) mandatory or a condition precedent to the right of a non-complying union to be recognized as the exclusive representative of employees.

⁷ 120 NLRB 1542.

⁸ *Sterling Processing Corporation*, 120 NLRB 567; *Retail Associates, Inc.*, 120 NLRB 388.

elections, but could obtain a certificate if they succeeded in those elections provided the unions perfected their compliance at a time when a certificate would normally flow.⁹ Thus, the compliance status of these unions *at the time of the potential award of a certificate* was made determinative.

If the election directed herein had been held prior to the enactment of Public Law 86-257, the Intervenor could have qualified for a certificate if it had won the election because the machinery for meeting the filing requirements of Section 9(f), (g), and (h) at the appropriate time was available. With the passage of Public Law 86-257 and the consequent repeal of that section, Congress has not only dispensed with the requirement of compliance as a condition to obtaining a Board certificate, but has also withdrawn the very machinery by which the Intervenor could achieve compliance if it wished to do so. Accordingly, if the Intervenor is successful in the election which we now direct, it would be anomalous for the Board to condition the award of its certificate upon the achievement of compliance when Congress has removed this requirement and there is no longer any possible statutory avenue available to obtain compliance with it. We therefore hold that, in the event the Intervenor wins the ensuing election, we shall certify it rather than the results of the election notwithstanding its noncompliance with Section 9(f), (g), and (h), because the Intervenor cannot and need not now comply. Moreover, in all other representation cases pending before the Board involving petitions filed prior to the repeal of that section, we shall issue a certificate to all noncomplying intervenors who are successful in elections directed after the repeal.

In reaching the conclusion announced above, we have carefully studied the legislative history of Public Law 86-257 for congressional guidance in construing the effect of the repeal of Section 9(f), (g), and (h) on the issue here involved. Contrary to our dissenting colleagues' assertion, we do not believe that Congressman Griffin's statement, which is the only congressional pronouncement concerning the repeal of that section, was intended to make currently impossible the Board's certification of an intervening noncomplying union *in a representation case* if it wins a Board election and has not achieved compliance at the time of certification. As the right to certification attaches as of the time the election has been consummated, to adhere to the dissent would be to give prospective application to a section already repealed. Nor do we believe that the principle of statutory construction adverted to by the dissenting Members has application here since no "penalty, forfeiture, or liability" attaches in a representation case.

[Text of Direction of Election omitted from publication.]

⁹ E.g., *Illinois Farm Supply Company*, 123 NLRB 793, footnote 2.

MEMBERS RODGERS and JENKINS, dissenting in part:

We do not subscribe to the decision of our colleagues to certify this noncomplying Intervenor should it win the election.

That decision is contrary to the express legislative purpose of Public Law 86-257, as shown by the statement of Congressman Griffin with respect thereto that

Section 201(d) will become effective upon enactment of the bill. However, the repeal of these sections [9(f), (g), and (h)] does not have a retroactive effect and is not intended to excuse any previous failure to comply therewith.

That decision is also contrary to the general principle of statutory construction that

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability . . . (1 U.S.C., Sec. 109).

As this Intervenor was not in compliance when this proceeding was begun, was not in compliance when it intervened herein, was not in compliance when Section 201(d) became effective, and is not in compliance when this decision is being issued, we see no reason to depart from the established procedure for dealing with this kind of situation.

Tennessee Packers, Inc. and United Packinghouse Workers of America, AFL-CIO. *Case No. 10-CA-3956. October 8, 1959*

DECISION AND ORDER

On June 9, 1959, Trial Examiner Thomas S. Wilson issued his Intermediate Report in the above-entitled proceeding, finding that 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.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Bean, and Fanning].

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 Interme-