

him of a sum of money equal to the amount he would have earned in Respondent's employ from that date to the date of offer of reinstatement less his net earnings during that period. Backpay shall be computed in accordance with the Board's *Woolworth* formula.<sup>1</sup>

The circumstances of the discharge are not such as to indicate a fixed determination on the part of the Respondent to deprive employees of rights secured by the Act. It is at least possible that the discharge of Holt was made in the belief that no statutory right was involved. In these circumstances I consider that a narrow cease-and-desist order is adequate.

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 Brotherhood of Carpenters and Joiners of America, Local Union No. 426, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
2. By discriminating in regard to the tenure of employment of James Holt, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) of the Act.
3. By the discharge of Holt the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and has thereby engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

<sup>1</sup> *F. W. Woolworth Company*, 90 NLRB 289

**Aluminum Tubular Corporation<sup>1</sup> and American Flagpole Equipment Co., Inc.<sup>2</sup> and Suffolk County District Council of United Brotherhood of Carpenters and Joiners of America, AFL-CIO.<sup>3</sup> Case No. 2-CA-6698. March 14, 1961**

#### DECISION AND ORDER

On May 13, 1960, Trial Examiner John H. Eadie issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel [Members Leedom, Jenkins, and Fanning].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed.

<sup>1</sup> Hereinafter referred to as Aluminum.

<sup>2</sup> Hereinafter referred to as Flagpole.

<sup>3</sup> Hereinafter referred to as the Carpenters.

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 Trial Examiner's findings, conclusions, and recommendations,<sup>4</sup> with the following modifications.

The Trial Examiner found that Aluminum's conduct on and after June 4, 1959, was violative of Section 8(a) (1) and (5) of the Act in that Aluminum refused to bargain in good faith with the Carpenters by (a) ignoring the Carpenters' telegram of June 4, 1959, and (b) failing to notify the Carpenters of its intention to discontinue operations on or after June 30, 1959.

We agree with the Trial Examiner's conclusion that the Respondent Aluminum violated Section 8(a) (5) and (1) by refusing to bargain in good faith with the Carpenters, as set forth above.

The Trial Examiner further found that the Respondents, Aluminum and Flagpole, "constituted a single employer at the East Setauket plant" and that, "as the *alter ego* of Aluminum" Flagpole "is in violation of Section 8(a) (1) and (5) of the Act and is responsible for remedying said unfair labor practice." The Trial Examiner also found that "All production and maintenance employees employed at the Respondents' East Setauket . . . plant . . . constitute a unit appropriate for the purposes of collective bargaining . . .," and he recommended that the Respondents be directed to cease and desist from refusing to bargain with the Carpenters with respect to such unit and to bargain as to such unit.

We agree with the Trial Examiner that Aluminum and Flagpole comprise a single employer under the Act. Such a finding, we believe, is compelled by the following facts, which are fully detailed in the Intermediate Report: William and Margaret Johnson have controlling ownership in Aluminum and own all the stock of Flagpole. The Johnsons exercise control over the labor policies of both companies. At East Setauket, where the operation involved is located, both companies have carried on their business in the same building since September 1958, maintaining a common stockpile of aluminum. Both companies produce identical products and Flagpole has used Aluminum's employees for construction and production work. Following Aluminum's unlawful refusal to bargain with the Carpenters, and its cessation of operations, Flagpole continued to operate Aluminum's business. It carried on the business with most of Aluminum's employees, using Aluminum's equipment, and fulfilling Aluminum's contracts. And, Aluminum depended on Flagpole's credit rating for the procurement of its raw materials. In view thereof it follows that both are responsible for the unlawful refusal to bargain herein. We

<sup>4</sup> In the absence of any exceptions to the Trial Examiner's failure to recommend specifically a remedy for violation of Section 8(a) (1) of the Act, we adopt, *pro forma*, his recommendation in effect that the remedy be limited solely to the 8(a) (5) violation. See *Gulf Atlantic Warehouse Co.*, 129 NLRB 42.

would therefore require both Respondents to bargain. However, contrary to the Trial Examiner, Aluminum's and Flagpole's bargaining obligations under the Board's Order shall be limited to bargaining with respect to the unit of Aluminum's employees for which the Carpenters was certified.

### ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Aluminum Tubular Corporation and American Flagpole Equipment Co., Inc., New York, New York, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Suffolk County District Council of United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive bargaining representative of its employees in the unit found appropriate by the Board on March 6, 1959, in Case No. 2-RC-9703.

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

(a) Upon request, bargain collectively with Suffolk County District Council of United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as the exclusive representative of all employees in the aforesaid appropriate unit.

(b) Post at their plant at East Setauket, Long Island, New York, copies of the notice attached hereto marked "Appendix."<sup>5</sup> Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by an authorized representative of the Respondents, be posted by the Respondents immediately upon receipt thereof, and be maintained by them for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Second Region, in writing, within 10 days from the date of this Order, what steps the Respondents have taken to comply herewith.

**MEMBER LEEDOM, concurring in part and dissenting in part:**

I concur in the decision of my colleagues that Aluminum unlawfully refused to bargain with the Carpenters. However, I do not agree with them insofar as they hold Flagpole responsible for the un-

<sup>5</sup> 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."

fair labor practices of Aluminum. In their view, Flagpole is responsible for the unfair labor practices of Aluminum mainly because the Johnsons, who own 51 percent of the stock in Aluminum, own all the stock of Flagpole, serve as directors and officers of both corporations, and control the operations of each. But, in addition to being a separate legal entity from Aluminum, the record shows that Flagpole has its own employees, and conducts its labor relations separately. Further, the Board certification of the Carpenters as the exclusive bargaining representative of Aluminum's production and maintenance employees makes no mention of Flagpole. In fact, Flagpole had at that time a contract with another union at the same location covering Flagpole's production and maintenance employees. The foregoing demonstrate to me that, under the circumstances, Aluminum and Flagpole do not constitute a single employer and that it is improper to require Flagpole to bargain concerning Aluminum's employees.

As I do not find Flagpole responsible for the unfair labor practices of Aluminum, I would dismiss the complaint as to Flagpole.

## APPENDIX

### 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, as amended, we hereby notify our employees that:

WE WILL bargain collectively upon request with Suffolk County District Council of United Brotherhood of Carpenters and Joiners of America, AFL-CIO, in the following appropriate bargaining unit:

All production and maintenance employees employed at our East Setauket, Long Island, New York, plant, exclusive of office clerical employees, professional employees, watchmen, guards, and all supervisors as defined in Section 2(11) of the Act.

ALUMINUM TUBULAR CORPORATION,  
*Employer.*  
AMERICAN FLAGPOLE EQUIPMENT Co., INC.,  
*Employer.*

Dated----- By-----  
(Representative) (Title)

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.

## INTERMEDIATE REPORT

## STATEMENT OF THE CASE

Upon a charge filed by Suffolk County District Council of United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for the Second Region, issued a complaint dated August 27, 1959, against "Aluminum Tubular Corporation and American Flagpole Equipment Co., Inc., Alter Ego, Successor and Party in Interest," respectively herein called Aluminum and Flagpole, alleging that the Respondents had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act.

The Respondents filed an answer on or about September 25, 1959, in which they admitted the jurisdictional allegations of the complaint insofar as they relate to Flagpole, but denied such allegations as to Aluminum and the commission of any unfair labor practices.

Pursuant to notice, a hearing was held at New York, New York, before the duly designated Trial Examiner on November 16 and 17, 1959. At the conclusion of the General Counsel's case the Respondents moved to dismiss the complaint. Ruling was reserved. The motions to dismiss are disposed of as hereinafter indicated. At the close of the hearing the General Counsel presented oral argument on the record. The General Counsel and the Respondents filed briefs with the Trial Examiner after the conclusion of the hearing.

The parties also filed with the Trial Examiner a stipulation dated December 28, 1959, which provides for the correction of the transcript of record. The stipulation is received in evidence as Trial Examiner's Exhibit No. 1.

Upon the entire record in the case, and from his observation of the witnesses, the Trial Examiner makes the following:

## FINDINGS OF FACT

## I. THE BUSINESS OF THE RESPONDENT

Aluminum was incorporated under the laws of the State of New York on August 1, 1955. On or about June 30, 1959, Aluminum discontinued its manufacturing operations. Prior to that time it manufactured tubular aluminum poles and related products at its plant located at East Setauket, Long Island, New York. During the year preceding the date of the hearing herein, Aluminum caused to be purchased, transferred, and delivered to its plant aluminum and other goods and materials, valued at in excess of \$50,000, which were transported to said plant in interstate commerce directly from States of the United States other than the State of New York.

Flagpole is a New York corporation with plants located in the Borough of the Bronx, city and State of New York, and in East Setauket, Long Island, New York. It is engaged at said plants in the manufacture, sale, and distribution of tubular aluminum poles, flagpoles, and related products. During the year preceding the date of the complaint herein, Flagpole, in the course and conduct of its business operations, caused to be purchased, transferred, and delivered to its Bronx plant aluminum and other goods and materials, valued at in excess of \$50,000, which were transported to said plant in interstate commerce directly from States of the United States other than the State of New York.

## II. THE LABOR ORGANIZATION INVOLVED

Suffolk County District Council of United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization which admits to membership employees of the Respondents.

## III. THE UNFAIR LABOR PRACTICES

A. *Statement of facts*

William Johnson and Margaret Johnson, husband and wife, are president and secretary-treasurer of Aluminum, respectively. Chad Raseman is its vice president. William Johnson, Margaret Johnson, Raseman, and B. Russell Gibbs are members of Aluminum's board of directors. Gibbs acted as engineer and plant manager until about March 1959. The stock of Aluminum is owned 51 percent by the Johnsons and 49 percent by Raseman and Gibbs.

William Johnson and Margaret Johnson are president and secretary-treasurer of Flagpole, respectively. They also are members of its board of directors and own all of its stock.

After its incorporation and until about September 1, 1958, Aluminum conducted its business in a converted barn in East Setauket. Flagpole did not use this barn for its production operations.

At all times material herein, Flagpole had a collective-bargaining agreement with International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, covering "all" of Flagpole's "production and maintenance employees." The contract presently in effect is "a renewal with some union fringe changes of a previously existing contract which expired just prior to July 1, 1958."

Since September 1, 1958, Aluminum and Flagpole "each had and still has a lease on the premises at East Setauket" (a new building). On or about January 26, 1959, Aluminum and Flagpole entered into a "Secured Distribution Agreement" with Bridgeport Brass Company "to store certain aluminum sold to them by said Bridgeport Brass Company in a field warehouse to be maintained for such purpose by Lawrence Warehouse Company." On the same date a field warehousing agreement was entered into between Flagpole and Lawrence Warehouse Company. On February 2, 1959, space at the Respondents' East Setauket plant was leased to Lawrence Warehouse Company, which space was used by said Company for establishing and maintaining a field warehouse in accordance with the above agreement.

After Flagpole joined in leasing the plant at East Setauket, it continued to operate its plant in the Bronx. At times some of Aluminum's employees performed work for Flagpole. Such work was "mostly construction"; and the employees involved were transferred to Flagpole's payroll.

On June 2, 1959, the Board certified the Union as the exclusive bargaining representative of Aluminum's production and maintenance employees at its plant at East Setauket. On June 4, 1959, the Union sent Aluminum the following telegram:<sup>1</sup>

We have received certification issued by the National Labor Relations Board designating our brotherhood as the collective bargaining agency for your employees you are requested to contact the undersigned at Mohawk 16507 for the purpose of arranging a mutually satisfactory time and place for the negotiation of a labor management agreement.

George Schmitt, financial secretary of the Union, testified credibly that within the week following the date of the above telegram he made about three "telephone calls to Mr. Johnson's office"; that some unidentified person in Aluminum's office told him that Johnson was not present; that he identified himself when he called; that about a week later he went to Aluminum's plant; that "on the two occasions I went [to the plant], the gate was locked. There was a sign on the gate, 'Blow Horn,' which I did. On one time of the two, someone started to walk down toward the gate. When they got half way down, they turned around and walked back"; and that the Union never received any reply from Aluminum in answer to its telegram or his telephonic calls. Schmitt went to Aluminum's plant again in August 1959 and had a conversation with Margaret Johnson. He told her that the purpose of his visit had "reference to the telegram—served as to the notice on bargaining." She told him that Aluminum was "no longer in business" and that "It was now American Flagpole." Schmitt then left the plant.

As related and found above, Aluminum ceased its operations on June 30, 1959. It had nine employees on its last payroll for the week ending July 1, 1959. Thereafter, and as of the date of the hearing herein, Flagpole employed five of the nine employees who formerly had worked for Aluminum. Flagpole also had two other production employees on its payroll as of the date of the hearing. Flagpole completed some of Aluminum's unfinished contracts, taking losses on some of the work which had been guaranteed personally by William Johnson. Since Aluminum ceased operations, Flagpole has used the equipment which was owned by Aluminum paying rent to Aluminum. As of the date of the hearing, Aluminum had not been dissolved.

For the year ending December 31, 1958, Aluminum had a deficit of \$59,665.76. Up to the end of May 1959, Aluminum had a further loss of approximately \$37,000.

<sup>1</sup>The telegram was addressed to "Johnson" and "Aluminum Tubular Corp." The parties stipulated that "This telegram was called in by Western Union to the addressee"; and that William Johnson was not present at the plant at the time. Margaret Johnson testified that she did not receive the telegram over the telephone and that she was not at the East Setauket plant on June 4. However, counsel for Aluminum admitted that the telegram from the Union was received by Aluminum "sometime in June."

About August 1958, Aluminum applied to the Franklin National Bank at Roosevelt Field, New York, for a loan of \$250,000 to cover the purchase of automatic machines. The bank advised Aluminum that it could not make the loan "because of the inadequacy, the incompleteness, of the financial statements that were submitted," and recommended that it retain the accounting firm of A. M. Pullen & Company. Pullen & Company thereafter prepared a financial report for Aluminum for the year ending December 31, 1958. From "an accounting point of view," this report showed that Aluminum was "insolvent." On about May 13, 1959, William and Margaret Johnson met with representatives of the Franklin Bank and Pullen & Company. The representative of the bank told the Johnsons, in substance, that the bank could not make the requested loan because of the "insolvent condition" of Aluminum, and recommended that Aluminum and Flagpole be consolidated "so as to eliminate that condition and have a better financial condition."

### B. Conclusions

It is clear from the evidence and I find that Aluminum's conduct on and after about June 4, 1959, was violative of Section 8(a)(1) and (5) of the Act. It refused to bargain in good faith with the Union by ignoring the Union's telegram of June 4, 1959, and by failing to notify the Union of its intentions to discontinue operations on and after June 30, 1959.

I find that Flagpole is the *alter ego* for Aluminum, as alleged in the complaint. For the purposes of the Act both Respondents constituted a single employer at the East Setauket plant. The evidence shows that the Johnson family has a controlling ownership in and exercises control over the policies of both companies.<sup>2</sup> Before June 30, 1959, Flagpole used Aluminum's employees for both construction and production work. After Aluminum ceased operations, Flagpole continued to perform Aluminum's contracts and retained five of Aluminum's nine employees in its employ. Both Respondents produced identical products, flagpoles and light poles. Aluminum depended on Flagpole's credit rating for the procurement of its raw materials and for performance of its contracts. Finally, the Johnsons were the actual participants in the unfair labor practices of Aluminum, as found above. Accordingly, Flagpole, as the *alter ego* of Aluminum, is in violation of Section 8(a)(1) and (5) of the Act and is responsible for remedying said unfair labor practices.

### 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 their business operations 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 thereof.

### V. THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

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. The Respondents, and each of them, are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and constitute a single employer for the purposes of the Act.

2. Suffolk County District Council of United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed at the Respondents' East Setauket, Long Island, New York, plant, exclusive of office clerical employees, professional employees, watchmen, guards, and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

<sup>2</sup> As found above, Gibbs did not act as plant manager for Aluminum after March 1959. When Aluminum was incorporated, the Johnsons made all capital investments.

4. The Union was, on June 2, 1959, and at all times since has been, the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to bargain with the Union on and after June 4, 1959, the Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

**Dal-Tex Optical Company, Inc. and International Union of Electrical, Radio and Machine Workers, AFL-CIO.** *Cases Nos. 16-CA-1325 and 16-RC-2571. March 14, 1961*

DECISION AND ORDER

On October 1, 1960, Trial Examiner Henry S. Sahn 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 further found that the Board-directed election in Case No. 16-RC-2571 should be set aside. Thereafter, the Respondent filed exceptions to the Intermediate Report.

Pursuant to the provision 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, Leedom, and Fanning].

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.<sup>1</sup> The Board has considered the

<sup>1</sup>In its exceptions, Respondent contends that the Trial Examiner erred in not finding that certain procedural objections made by it during the course of the hearing were meritorious. In substance, Respondent's contentions in this regard are as follows: (1) That there is a fatal variance between the charge and the complaint; (2) that it was improper to consolidate the representation case with the complaint case in this proceeding; (3) that its motion for a bill of particulars should have been granted; and (4) that its request for a continuance should have been granted. As to (1), the charge alleged that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging certain named employees. It further alleged that by the acts set forth, and "by other acts and conduct, it, by its officers, agents, and employees, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act." The complaint is limited to allegations of independent Section 8(a)(1) violations. As it is clear that the allegations of the complaint grew out of and were a part of the same fact situation which gave rise to the charge, we find no merit in this contention. See *N.L.R.B. v. Fant Milling Company*, 360 U.S. 301; *N.L.R.B. v. Kohler Company*, 220 F. 2d 3 (C.A. 7). As to (2), the complaint contains allegations of Section 8(a)(1) conduct which would have a direct bearing upon the validity of the prior election. In such circumstances, we believe the Regional Director acted properly in con-