Marshall Maintenance Corp. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO. *Case No. 22–CA–1878. August 19, 1965*

DECISION AND ORDER

On June 3, 1965, Trial Examiner Stanley Gilbert issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

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

The Board has revised the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner and orders that the Respondent, Marshall Maintenance Corp., Trenton, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[2]

[1] We hereby correct the inadvertent errors in the second and fourth paragraphs of subsection 7 of the section entitled "The Affirmative Defenses and Conclusions" in the Trial Examiner's Decision, by substituting "January 25, 1962," for "January 25, 1963"; and "January 7, 1964," for "January 7, 1963."

[2] The telephone number for Region 22, given at the bottom of the notice attached to the Trial Examiner's Decision, is amended to read: 645–3088.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Based upon a charge filed February 25, 1964, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, hereinafter referred to as UAW or the Union, the complaint herein was issued December 1, 1964. Said complaint alleged that Respondent, Marshall Maintenance Corp., violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing and continuing to refuse to recognize and bargain with the UAW since on or about January 7, 1964. On January 11, 1965, an amendment to

the complaint was issued to allege a further request by the UAW for recognition and bargaining made on or about December 4, 1964 (subsequent to the issuance of the original complaint). Respondent, in its answer, denied that it violated Section 8(a)(5) and (1) of the Act and alleged seven affirmative defenses.

Pursuant to notice, a hearing was held on February 1, 1965, in Trenton, New Jersey, before Trial Examiner Stanley Gilbert. Within the time set therefor briefs were submitted by the General Counsel and Respondent.

Upon the entire record herein, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a New Jersey corporation with principal office and place of business in Trenton, New Jersey, is engaged in the business of repairing buildings, installing and moving machinery, installing special devices in factories, and performing related services. In the course of its business operations during the fiscal year ending September 30, 1964, a representative period, Respondent caused to be purchased, transferred, and delivered to its place of business in the State of New Jersey machinery parts and other goods valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported to said place of business in interstate commerce directly from States of the United States other than from the State of New Jersey.

As is conceded by Respondent, it is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

As is conceded by Respondent, the UAW [1] is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

No testimony was introduced at the hearing in the instant case. Instead, the parties entered into a stipulation [2] of the pertinent facts and various documents were received in evidence without objection.

Summary of Pertinent Facts

On December 1, 1961, the UAW [3] filed a petition in Case No. 22–RC–1438 seeking an election among the production and maintenance employees of Respondent.

On January 5, 1962, a stipulation for certification upon consent election was executed by the UAW and the Respondent and approved by the Regional Director for Region 22.

On January 6, 1962, the UAW [3] filed a charge in Case No. 22–CA-1113 alleging that John J. Welch and Paul Brown were discharged by the Respondent in violation of Section 8(a)(1) and (3) of the Act.

On January 25, 1962, pursuant to the aforementioned stipulation for certification upon consent election, an election by secret ballot was conducted under the direction and supervision of the Regional Director for Region 22 among the employees of

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[1] In May 1962, the UAW, by constitutional amendment, changed its name by substituting the word "aerospace" for "aircraft" and the official title of the labor organization became as it appears in this proceeding. 50 LRRM 54. However, it should be noted that Respondent raised as a defense the matter of the identity of the Charging Party because of the difference between its present name and its name prior to May 1962. This issue is considered hereinbelow.

[2] By further stipulation received subsequent to the close of the hearing General Counsel and Respondent, in effect, moved to correct two sentences of the transcript of the proceedings before me. The motion is granted and the transcript is corrected as follows:

On Page 11, lines 10/12 to read as follows: "On September 13, 1963, the board set aside its order of November 9, 1962 and vacated its certification dated July 12, 1963, pending a decision in the entire proceedings."

On Page 12, lines 11/13 to read as follows: "January 7, 1964, a written request, general counsel's exhibit 2, was sent to and received by the respondent"

[3] The name of said labor organization was designated in said proceedings as it was prior to the change in its name effected in 1962.

the Respondent in the stipulated production and maintenance unit. At the conclusion of the balloting, the parties were furnished a tally of ballots which showed that of approximately 24 eligible voters 24 cast ballots, of which 11 were for and 11 were against the Petitioner and 2 ballots, those of Brown and Welch, who had been discharged prior to the election, were challenged. The challenges were sufficient in number to affect the election. Thereafter, the Petitioner filed objections to the election, which it subsequently requested be withdrawn.

On February 23, 1962, the Regional Director for Region 22 issued a complaint in Case No. 22–CA–1113, alleging, *inter alia,* that the two challenged voters in Case No. 22–RC–1438 (Brown and Welch) had been discriminatorily discharged in violation of Section 8(a)(1) and (3) of the Act. Thereafter, the aforementioned challenges were consolidated for hearing with the complaint in Case No. 22–CA–1113.

On April 11 through April 13, 1962, a hearing was held before a Trial Examiner with respect to the challenges in Case No. 22–RC–1438 and the complaint in Case No. 22–CA–1113.

On July 24, 1962, the Trial Examiner issued his Intermediate Report in which he recommended, *inter alia,* that the challenges be overruled and the ballots be opened and counted. He further found that the Respondent violated Section 8(a)(1) and (3) of the Act in discharging Brown and Welch and recommended an Order providing for their reinstatement with backpay. Respondent thereafter filed exceptions to the Trial Examiner's Report which exceptions the Board subsequently rejected as untimely filed.

On November 9, 1962, the Board issued an Order adopting the findings and recommendations of the Trial Examiner.

On November 24, 1962, Respondent filed a motion for reconsideration of the Board's Order of November 9, 1962, and for a reopening of the proceeding.

On December 18, 1962, the Board denied Respondent's motion of November 24 and affirmed its November 9 Order.

On March 28, 1963, the aforementioned Regional Director opened and counted the challenged ballots and issued a revised tally of ballots which showed that, of 24 ballots cast, 13 were for and 11 were against the UAW.

Also on March 28, 1963, the Board filed a petition for summary enforcement of its November 9 Order in the Circuit Court of Appeals for the Third Circuit.

On March 30, 1963, the Respondent filed timely objections to the opening of the challenged ballots and to the issuance of the revised tally of ballots.

On April 9, 1963, the Regional Director issued a report on objections to the revised tally of ballots, in which he recommended that the objections be overruled and that the UAW be certified.

On July 12, 1963, the Board adopted the findings, conclusions, and recommendations of the Regional Director and certified the UAW as the collective-bargaining representative, within the meaning of Section 9(a) of the Act, of Respondent's production and maintenance employees at its Trenton, New Jersey, plant.

On July 30, 1963, the Circuit Court of Appeals for the Third Circuit denied summary enforcement of the Board Order of November 9, 1962, in Cases Nos. 22–CA–1113 and 22–RC–1438, concluding that certain extraordinary circumstances excused the late filing of Respondent's exception.[4]

On September 13, 1963, the Board issued an Order setting aside its prior Order of November 9, 1962, and vacating its Decision and Certification of Representative in Case No. 22–RC–1438, dated July 12, 1963.

On October 1, 1963, the decree of the Circuit Court of Appeals was issued, denying enforcement and remanding both cases (Cases Nos. 22–CA–1113 and 22–RC–1438) to the Board for further proceedings consistent with the court's order.

On October 30, 1963, the court sent the record to the Board.

On December 19, 1963, after considering Respondent's exceptions on their merits, the Board issued a Decision and Order (145 NLRB 538) in Case No. 22–CA–1113 substantially adopting the findings and recommendations of the Trial Examiner with respect to the discharges of Brown and Welch.

Also on December 19, 1963, the Board issued an order severing Case No. 22–RC–1438 from Case No. 22–CA–1113 and amending its certification of July 12, 1963, by dating the certification December 19, 1963.

On January 7, 1964, a letter was sent to Respondent signed by "John LaEzza, Int'l Rep." which requested that Respondent bargain with the "UAW–AFL–CIO." Respondent received said letter but made no reply thereto.

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[4] *N.L.R.B.* v. *Marshall Maintenance Corp.,* 320 F. 2d 641 (C.A. 3).

On January 11, 1964, the Employer (Respondent herein) filed a motion in Case No. 22–RC–1438 requesting, in part, that the Board withdraw its certification in Case No. 22–RC–1438 and declare that proceeding null and void. In said motion Respondent contended that a fluctuation in the size of the bargaining unit presented "unusual circumstances" which required and warranted a new election.

On February 25, 1964, the charge was filed in the instant case.

On April 14, 1964, the Board denied Respondent's aforesaid motion insofar as it pertained to Case No. 22–RC–1438, stating that said motion presented nothing not previously considered by the Board and that the Board's ruling was without prejudice to the Respondent's right to renew said motion upon the issuance of a final Board Order in Case No. 22–CA–1113 (which was ordered reopened for further hearing).

Also on April 14, 1964, the Board entered an order in Case No. 22–CA–1113 for further hearing in said case before a Trial Examiner "for the limited purpose of receiving evidence bearing on the suitability for reinstatement of John J. Welch and Paul Brown, and their right to backpay and the date on which the right of each to backpay and reinstatement may have ceased. . . ."

On August 3, 1964, the Trial Examiner issued his Supplemental Decision in Case No. 22–CA–1113, recommending, in part, that the Respondent be required to offer reinstatement to employees Welch and Brown and to make them whole for any loss of pay they may have suffered.

On November 16, 1964, the Board issued a Supplemental Decision and Order in Case No. 22–CA–1113 (149 NLRB 735),[5] affirming in substance its earlier decision in that proceeding (145 NLRB 538).

On December 1, 1964, the complaint in the instant case was issued.

On December 4, 1964, a letter was written addressed to Respondent signed by "John B. LaEzza, UAW International Rep." which contained, *inter alia*, a request that Respondent enter into bargaining negotiations with "the United Automobile Workers AFL–CIO" as bargaining agent for Respondent's production and maintenance employees. Respondent received said letter but made no response thereto.

The Bargaining Unit

All production and maintenance employees at Respondent's Trenton place of business, excluding 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.[6] The above-described unit was the unit for which the UAW was certified by the Board as collective-bargaining agent. The UAW's requests of January 7 and December 4, 1964, were with respect to the above-described unit.

The Issues

The Respondent denied the allegations contained in paragraphs 8 through 14 of the complaint. It appears that the bases for said denials are set forth in the seven affirmative defenses. The factual elements contained in said allegations are supported by the record. The issues are not with respect to whether said factual elements are true, but, rather, with respect to the legal effects thereof.

It is alleged in paragraph 8 as follows:

> On or about January 25, 1962, a majority of the employees of Respondent, in the unit . . . [the unit described hereinabove] by a secret ballot for the Twenty-second region of the Board, designated and selected UAW as their exclusive representative for the purposes of collective bargaining with Respondent, and on or about December 19, 1963, the Board certified that UAW was the exclusive collective bargaining representative of the employees in said unit.

Paragraph 9 of the complaint alleges in substance that at all times since December 19, 1963, UAW has been, and is now, the exclusive bargaining representative of the employees in the aforementioned unit. The Respondent by its denials of said paragraphs challenges the conclusion in paragraph 9, based upon its affirmative defenses.

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[5] In view of this determination, which in effect confirmed the eligibility of the challenged voters, Brown and Welch, Respondent did not renew its aforementioned motion of January 11, 1964, in Case No. 22–RC–1438.

[6] The foregoing was alleged in paragraph 7 of the complaint, which allegation was admitted by Respondent.

Paragraphs 10 and 11 of the complaint, as amended, allege in substance that on or about January 7, 1964, and at other times thereafter, including on or about December 4, 1964, UAW requested Respondent to bargain collectively with respect to the aforesaid unit, and that Respondent has refused and continues to refuse to recognize and bargain collectively with UAW as the exclusive collective-bargaining agent of the employees in said unit. The record discloses that there was a request on January 7, 1964, and a further request on December 4, 1964. It was stipulated by the parties "that no response was made by the respondent to either the demand of January 7, 1964, and December 4, 1964, and that since that time the respondent has refused and now refuses to recognize and bargain collectively with the charging party in this proceeding as the representative of its employees in the unit found appropriate by the Board in its certification of December 19, 1963."

Paragraphs 12, 13, and 14 of the complaint allege, in substance, that by such refusal to recognize and bargain Respondent has violated Section 8(a)(5) and (1) of the Act. For the reasons set forth in its affirmative defenses, Respondent contends that its said refusal was not violative of the Act. Therefore, the issues in this proceeding are whether the affirmative defenses are of sufficient merit to remove Respondent's refusal from the prohibitions of Section 8(a)(5)and (1) of the Act.

The Affirmative Defenses and Conclusions

1. The first affirmative defense may be summarized as follows: On November 9, 1962, the Board issued an Order adopting the Recommended Order of the Trial Examiner in the consolidated proceedings in Cases Nos. 22–CA–1113 and 22–RC–1438, and, since the United States Circuit Court of Appeals by its decision on July 30, 1963, denied the Board's petition for summary enforcement of said Board Order, and, since the Board set aside said Board Order, all proceedings of the Regional Director and proceedings based on the November 9 Order, including the certification of UAW by the Board on July 12, 1963, "are without any proper authority of law and are now void."

The circuit court of appeals denied enforcement based upon the decision that the Board should not have refused to consider on their merits, because of untimely filing, the Respondent's exceptions to the Trial Examiner's report of July 24, 1962. Thereafter, the Board, vacated its Order of November 9, 1962 (which adopted the Trial Examiner's report), vacated its certification of the Union, and considered Respondent's exceptions on their merits. On December 19, 1963, the Board issued Orders affirming in substance the aforesaid Trial Examiner's report and severing Case No. 22–RC–1438 from Case No. 22–CA–1113, and amended the certification of the UAW by dating the certification as of that date, December 19, 1963.

Respondent argues that the Regional Director's action of March 28, 1963 (opening and counting the ballots and issuing a revised tally), his report of April 9, 1963 (overruling the objections of Respondent to said action and recommending that the Union be certified), and the Board's action of July 12, 1963 (adopting his report and certifying the Union) were predicated upon the order of November 9, 1962, which was set aside, and were, therefore, of no validity.

Even if it were assumed that the issue raised by this defense could be litigated in this proceeding and that the failure to repeat the actions predicated on the November 9 Order was an error, there is no indication that such error was prejudicial to Respondent. The inappropriateness, if any, of the proceedings predicated on the November 9 Order was rectified by the reaffirmance of said Order by the Board's Order of December 19, 1963, and the amendment of the certification, as of that date. It would have been meaningless to require the Regional Director to repeat his actions with respect to the opening of the challenged ballots, and to issue again the revised tally and his report on objections of Respondent thereto.

In any event, the Board's amended certification of December 19, 1963, is binding upon the Trial Examiner, there being no change in circumstances presented by this first defense, but, rather, only such circumstances were presented at the time the certification was amended and which were apparent to the Board.

It is concluded, therefore, that there is no merit in this first affirmative defense.

2. The second affirmative defense is substantially the same as the first except that the reason advanced for the actions and proceedings being invalid is that said actions and proceedings were taken during the period the cases were pending before the circuit court of appeals and that said court had "exclusive" jurisdiction "until its decree of October 1, 1963." It is argued that the Board had no jurisdiction during that period and, therefore, the said actions and proceedings "were and are null and void." The second affirmative defense is of no merit for the same reasons as those set forth in regard to the first affirmative defense.

3 and 4. The third affirmative defense is as follows: "That the within complaint is based upon an Order and Orders and Proceedings which are not in compliance with the procedures established by the Board's Rules and Regulations and the Administrative Procedure Act, are improper and void and are without Due Process." The fourth affirmative defense is that for the same reasons the instant proceedings are "premature" and are "otherwise an abuse of the Administrative power and discretion."

The Respondent has not indicated in its brief which provisions of the National Labor Relations Board Rules and Regulations Series 8, as amended, or the Administrative Procedure Act have not been complied with; nor has the Respondent spelled out the reasons why the action in issuing the complaint herein was "premature" and there has been "an abuse of Administrative power and discretion." From a reading of the Respondent's brief the contentions which appear to relate to these two affirmative defenses seem to be, in substance, that the certification of the Board of December 19, 1963, being an amendment of the prior certification of July 12, 1963, has no validity since the July 12 certification was predicated on proceedings based on the November 9 Order which was vacated and/or was part of a series of actions and proceedings taken while the cases were pending in the circuit court of appeals, and, thus, at a time when the Board had no jurisdiction in said cases. To state it succinctly, the argument seems to be that, since the July 12 certification was invalid, the December 19 amendment thereof was tainted with the same legal defects, and the instant complaint, being predicated on the defective certification, was, therefore, "premature" and its issuance was an abuse of administrative power and discretion.

Even if it were to be assumed that such argument can be considered in this proceeding, it is without merit. It appears to be no more than a contention that the Board, in order to certify the Union properly as of December 19, 1963, should have issued a new certification instead of amending the July 12 certification by substituting the December 19 date. However, the effect of the amendment was to adopt by reference on December 19 the language of the certification of July 12. If this were error, it was, at the most, merely a minor one of procedure and was not prejudicial to Respondent. In any event, Respondent does not raise by these defenses circumstances which would furnish a basis for concluding that the Board's amended certification of December 19, 1963, is not binding on the Trial Examiner.

It is concluded, therefore, that there is no merit in the third or fourth affirmative defense.

5. The fifth affirmative defense is as follows:

That the complaint is based upon alleged unfair labor practices occurring more than 6 months prior to the filing of any proper or valid charge with the Board. Respondent is apparently referring to Section 10(b) of the Act which provides, *inter alia*:

> That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof . . . .

In support of this defense, Respondent states in its brief as follows:

> If the January 7th demand should be held not sufficient to impose any obligation on the Respondent, the statute of limitations would apply. There would then be left open the determination of the effect and validity of the December 4th demand, which did not require a response during the certification year, and was made after the issuance of the complaint. In the face of these challenges by the Respondent, this defense is a proper and legitimate one which cannot be described as frivolous.

Inasmuch as the charge was served on February 26, 1964, less than 2 months after the request to bargain (on January 7, 1964) with respect to which the Respondent admittedly refused to comply, there is apparently no basis upon which the provision in Section 10(b) of the Act can be said to apply to the circumstances in this case. Therefore, this defense is without merit. Even if, as the Respondent contends, it were to be found that there was no obligation to bargain raised by the demand of January 7, 1964, the limitation contained in Section 10(b) of the Act would have no application to the circumstances of this case.

6. The sixth affirmative defense is as follows:

> That the Board's failure to investigate and/or otherwise act upon the charge from the time of its filing to the issuance of the within is improper, an abuse of discretion, and without any basis or foundation in law or fact.

The charge in this case was filed on February 25, 1964, and the complaint was issued approximately 9 months later, on December 1, 1964. It is apparently the Respondent's contention that this delay was an abuse of discretion, and that the issuance of the complaint in such circumstances was improper.

On December 19, 1963, the Board issued its amended certification of the Union. On January 11, 1964, the Respondent filed a motion requesting the Board to withdraw the certification, which motion was denied on April 14, 1964. Also on April 14, 1964, Case No. 22–CA–1113 was reopened for further hearing on the right of reinstatement and backpay of Welch and Brown. In denying Respondent's motion that the Board withdraw its certification, the Board stated that its denial was without prejudice to the Respondent's right to renew said motion upon the issuance of a final Board Order in Case No. 22–CA–1113. The Respondent raised the issue in said case of the appropriateness of reinstating Brown and Welch and, since their votes were determinative of the Union's majority, the determination of this issue might have affected the appropriateness of the certification. As was indicated in the hearing in the instant case, Respondent did not renew its motion, because, on August 3, 1964, a Trial Examiner issued a Supplemental Decision in Case No. 22–CA–1113, ordering reinstatement and backpay, and on November 16, 1964, the Board issued its Supplemental Decision affirming in substance its earlier Decision that Brown and Welch were entitled to reinstatement and backpay. Consequently, since the votes of Brown and Welch were appropriately counted, the Union did have a majority and no purpose would have been served in renewing said motion.

The complaint in the instant case was issued approximately 2 weeks after said Supplemental Decision of the Board. It seems reasonable to infer that the complaint was not issued earlier, because the Regional Director was awaiting said Supplemental Decision which, had the Board made a determination in favor of Respondent's contentions, might have afforded a basis for granting Respondent's motion, upon its renewal, for the withdrawal of the certification of the Union. Even if it were to be assumed that a delay in issuing the complaint for approximately 9 months after the filing of the charge can be considered in this proceeding,[7] in the circumstances of this case there was a reasonable ground for such delay (pending the final disposition by the Board of Respondent's contentions with respect to the appropriate remedy for its discriminatory discharge of Brown and Welch). Therefore, this defense raises no legal or equitable basis for finding that the complaint was improperly issued, or that there was an abuse of discretion in issuing it.[8]

7. The seventh affirmative defense is as follows: "The size and composition of the bargaining unit have fluctuated radically. Respondent has a good-faith doubt as to the representative status of the union in the unit involved."

As of the date of the election on January 25, 1963, the unit consisted of 24 employees. (The tally of their votes after counting the challenged votes of Welch and Brown was 13 in favor of the Union and 11 against the Union.) It was stipulated that on January 7, 1964, the date of the first demand, the unit consisted of 38 employees; on December 4, 1964, the date of the second demand, it consisted of 65 employees; and that on both of the aforesaid dates only 14 of the employees had been in the unit at the time of the election.

On January 11, 1964, Respondent filed a motion in which it stated that since the time of the election the unit had doubled and only 14 of the original unit were still in its employ, and based upon said facts, contended, "The size and composition of the bargaining unit having fluctuated radically there exists unusual circumstances which require and warrant a new election in this unit . . . ." The Board, by its Order of April 14, 1964, stated that said motion was lacking in merit. Therefore, the Board has already passed on the contention of the existence of "unusual circumstances" based upon the same circumstances pleaded herein and found there was no merit in such contention. The Respondent admittedly refused to recognize and bargain with the Union after its demand on January 7, 1964, and the Board's finding that "unusual circumstances" did not exist at that time which warranted a new election is binding upon the Trial Examiner.

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[7] It is well established, however, that a delay in the issuance of the complaint after a charge has been timely filed cannot be invoked as a defense to the complaint

[8] The last phrase of the defense ("without any basis or foundation in law or fact") is ambiguous in its context. However, whether it is construed to mean "that the Board's failure to investigate and/or otherwise act on the charge from the time of its filing to the issuance of the within complaint . . . is without any basis or foundation in law or fact" or that the complaint is without any basis or foundation in law or fact, neither of said contentions is of any merit.

Even if it were to be assumed that the Respondent could raise this contention at this point, it would be concluded that it is without merit. The delay in the demand for recognition after the election was occasioned by the litigation of Respondent's unfair labor practices (the discriminatory discharges of Welch and Brown). At the time of the first demand (on January 7, 1963) the certification was less than 1 month old and at the time of the issuance of the complaint herein the certification was still less than 1 year old. As indicated hereinabove, the delay in the issuance of the complaint was occasioned by further litigation of issues arising out of the aforementioned unfair labor practices of Respondent.

The Respondent argues that it has a good-faith doubt of the Union's majority status in said unit because of its expanded size. The refusal to bargain commenced at a time when the certificate was only a few weeks old and in the context of unfair labor practices designed to discourage membership in the Union. In the circumstances of this case, the Respondent may not raise a defense of good-faith doubt. In *Celanese Corporation of America,* 95 NLRB 664, 673 (one of the cases cited by Respondent), although finding that the respondent therein was free to decline to bargain with the union because it had a good-faith doubt of the union's majority when the certificate was over a year old at the time of the alleged refusal to bargain, the Board stated "the majority issue must *not* have been raised by the employer in a context of antiunion activities, or other conduct by the employer aimed at causing disaffection from the Union . . . ." In the instant case, the refusal to recognize and bargain commenced near the beginning of the certification year and was in the context of antiunion activities.

It is concluded, therefore, that there is no merit in this seventh defense.

Respondent, in its brief, raises a defense which was not specifically raised by its answer. The defense is stated as follows:

> The certification of July 12, 1963 [as amended on December 19, 1963] runs to the "International Union, United Automobile, *Aircraft,* Agricultural Implement Workers of America (UAW, AFL–CIO)." [Emphasis supplied.]
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> On January 7, 1964 a demand was made under the stationery of International Union, United Automobile, *Aerospace,* Agricultural Implement Workers of America (UAW) (CIO) Amalgamated Local 731 of 1320 Parkway Avenue, Trenton 28, New Jersey (General Counsel's Exhibit 2). [Emphasis supplied.] After the issuance of the complaint a demand was made on December 4, 1964 by International Union, United Automobile, *Aerospace* & Agricultural Implement Workers of America–UAW of 1619 E. Wadsworth Avenue, Philadelphia, Pa. (General Counsel's Exhibit 3). [Emphasis supplied.]
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> Although the Local above referred to, or some similar Local, was named in the original representation petition as having an interest, the Local did not appear on the ballot and was not certified.
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> The Union making the demand on December 4, 1964 was not the same Union certified by the Board.
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> Before an Employer can be held liable for failure to bargain with a duly certified Union the latter must make a proper demand for bargaining. The January 7th demand is by a Local which has not been certified. The same applies to the December 4th demand; that demand is made by a Union which was not certified. There has never been application made by either of the Unions to amend the Certifications to include the name of either the Local or the Union. An Employer is not required to bargain with any labor organization whose name does not appear on the ballots nor to whom the Certification does not run or extend. (*General Electric Co.,* 89 NLRB No. 120 [727]; *Newark Stove Co.* [sic], *The Standard Oil Co.,* 92 NLRB No. 63 [227]).

Although the demand of January 7 was made on the letterhead of the aforementioned Local, it is clear from the contents of the letter and from the indicated title of the person signing it that the demand was being made by the International Union and not the Local. It is true that in the certification the name of the Union contained the word "aircraft" instead of "aerospace." It is evident that both names referred to the same labor organization. As indicated hereinabove, in May 1962, by constitutional amendment the name of the Charging Party herein was changed by substituting the word "aerospace" for the word "aircraft." Since the Charging Party is, in fact, the same labor organization as was certified, it is found that the mere fact that there was a minor change in its name has no bearing on the issues in this case.

It is concluded that Respondent was obligated to recognize and bargain with the Union as the collective-bargaining representative of the unit of its employees described hereinabove commencing on January 7, 1964. The fact that there were no further requests for bargaining until December 4, 1964, does not indicate that the UAW had abandoned its efforts to be recognized and to bargain for Respondent's production and maintenance employees. During the period intervening between the two demands, as is indicated above, there was further litigation arising with respect to the discriminatory discharges of Brown and Welch which might have resulted in a determination that the certification of the UAW was improper. However, by the Board's Supplemental Decision and Order of November 16, 1964, that possibility was removed. Consequently the complaint was issued on December 1, 1964, alleging the unlawful refusal to bargain commencing on or about January 7, 1964. In refusing to grant the request to bargain of January 7, 1964, Respondent acted at its peril and, in the circumstances, it is clear that any further requests made by the Union prior to the Board's Decision and Order of November 16, 1964, would have been fruitless.

It is concluded, therefore, that there is no merit in any of the defenses raised by the Respondent, and that, commencing on or about January 7, 1964, Respondent refused, and has continued to refuse, to recognize and bargain with the Union as the duly certified collective-bargaining agent of Respondent's production and maintenance employees in violation of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of the Respondent set forth in section III, above, occurring in connection with its operations 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

Pursuant to Section 10(c) of the Act, it will be recommended that the Respondent be ordered to cease and desist from engaging in the unfair labor practices found herein and take certain affirmative action designed to effectuate the policies of the Act. To remedy the Respondent's unlawful refusal to fulfill its statutory obligation to recognize and bargain with the Union, it will be recommended that it be ordered to bargain, on request, with the Union, as the exclusive representative of its employees in the appropriate unit described above, and, if an understanding is reached, embody such understanding in a signed agreement.

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 Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All production and maintenance employees employed at Respondent's Trenton place of business, excluding 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.
4. The Union has been the duly certified exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act since December 19, 1963.
5. By refusing, since on or about January 7, 1964, to recognize and bargain collectively with the Union as the exclusive bargaining representative of the employees in the aforesaid appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is ordered that the Respondent, Marshall Maintenance Corp., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, as the exclusive representative of the Company's employees in the unit described below, concerning rates of pay, wages, hours of employment, and other terms and conditions of employment:

All production and maintenance employees employed at Respondent's Trenton place of business, excluding office clerical employees, professional employees, guards, and all supervisors as defined in the Act.

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

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union, as the exclusive representative of its employees in the above-described unit, concerning rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant in Trenton, New Jersey, copies of the attached notice marked "Appendix." [9] Copies of said notice, to be furnished by the Regional Director for Region 22, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it 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 Respondent to insure that said notices are not altered, defaced, or covered by any other material.

Notify the Regional Director for Region 22, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply herewith.[10]

[9] In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order".

[10] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order 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 NOT refuse to recognize and bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, as the exclusive representative of our employees in the unit described below, concerning rates of pay, wages, hours of employment, and other terms and conditions of employment:

All production and maintenance employees employed at our Trenton place of business, excluding office clerical employees, professional employees, guards, and all supervisors as defined in the Act

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL bargain collectively, upon request, with the above-named Union, as the exclusive representative of our employees in the above-described unit, concerning rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, we will embody such understanding in a signed agreement.

MARSHALL MAINTENANCE CORP.,
Employer.

Dated_____ By_____
(Representative) (Title)

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 614 National Newark Building, 744 Broad Street, Newark, New Jersey, Telephone No. Market 4–6151.

National Freight, Inc. *and* Local Union No. 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 2–CA–9319. August 20, 1965*

DECISION AND ORDER

On February 16, 1965, Trial Examiner E. Don Wilson issued his Decision 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 attached Trial Examiner's Decision. Thereafter, Respondent and General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs.

The National Labor Relations Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner except as modified herein with regard to the discharge of Supervisor Dillin and the remedial order as to employee Foster.

The circumstances surrounding the terminations of Dillin and Foster are set forth in detail in the Trial Examiner's Decision. Briefly, the Respondent was engaged in over-the-road trucking and, although it had its own trailers, conducted its business by leasing nearly all its tractors from individual lessors. Dillin owned two tractors, one of which was driven by Foster, and both men were terminated because of their membership in the Union.

The Trial Examiner found that Respondent violated the National Labor Relations Act, as amended, by terminating Dillin's lease and discharging Dillin and Foster because of their respective union