

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 bargain collectively with Carpenters' Union Local 971, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, as the exclusive representative of our employees in the bargaining unit described below, by failing and refusing to furnish the said Union the financial data requested by it on June 5, 1964.

WE WILL furnish to the above-named Union the requested financial data detailed above in order that it may properly discharge its function as the statutory bargaining representative of our employees in the appropriate unit.

WE WILL NOT in any like or related manner refuse to bargain collectively with said labor organization as the exclusive representative of our employees in the bargaining unit described below:

All employees of the following named members of Northern Nevada Cabinet and Mill Operators Council of Home Builders Association of Northern Nevada, namely, Bud's Cabinet & Fixture Co., Builders Mill, and Powell Cabinet & Fixture Co., performing carpentry work at their cabinet shops and mills in the Reno-Sparks, Nevada, area, excluding office clerical employees, guards, and supervisors as defined in the Act.

NORTHERN NEVADA CABINET AND MILL OPERATORS COUNCIL OF HOME BUILDERS ASSOCIATION OF NORTHERN NEVADA,

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

BUD'S CABINET & FIXTURE CO.,

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

BUILDERS MILL,

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

POWELL CABINET & FIXTURE CO.,

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.

Employees may communicate directly with the Board's Regional Office, 450 Golden Gate Avenue, San Francisco, California, Telephone No. 556-3197, if they have any question concerning this notice or compliance with its provisions.

Shawnee Plastics, Inc. and District 153 of the International Association of Machinists, AFL-CIO. Case No. 25-CA-2120. September 14, 1965

DECISION AND ORDER

On June 21, 1965, Trial Examiner Boyd Leedom issued his Decision 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 attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, 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 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 Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, 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, Shawnee Plastics, Inc., Evansville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.¹

¹The telephone number for Region 25, appearing at the bottom of the Appendix attached to the Trial Examiner's Decision, is amended to read: Telephone No. 633-8921.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This case was tried in Evansville, Indiana, on April 12, 1965, before Trial Examiner Boyd Leedom. The parties stipulated that the correct name of the Respondent is as it appears in the caption of the case. The complaint, dated February 4, 1965 (issued on a charge filed against Respondent January 18, 1965), alleges that Respondent unlawfully refused to bargain with the Union, the certified representative of an appropriate unit of Respondent's employees, thereby violating Section 8(a)(5) and (1) of the Act.

Respondent denies that it violated the Act as alleged, notwithstanding it did refuse to bargain with the Union and has failed and refused to bargain since January 12, 1965. Respondent seeks to justify its refusal to bargain on these assertions: That in an election held on March 31, 1964, the employees in the unit failed to give the Union a majority of the votes cast; that this was a valid election; that the second or "rerun" election conducted on July 1, 1964, was invalid by reason of the fact that the Regional Director had erroneously set aside the earlier election on objections to the conduct of the Respondent in connection therewith; and that the certification issued to the Union on the results of the second election was also invalid, a lack of majority status having been established in the earlier, i.e., March 31, 1964, election; and furthermore that the Regional Director acted capriciously and improperly: (1) in not setting aside the second election on objections filed by Respondent; (2) in determining that one Olive Aulenbacher was a supervisor; and (3) in failing to resolve challenges of four other employees who voted in the second election.

On the entire record and the briefs filed by the parties, and for the reasons hereafter appearing, I find and conclude that Respondent did violate Section 8(a)(5) and (1) of the Act as alleged in the complaint.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I find as facts the allegations of the complaint as to the nature and volume of business done by the Respondent, a manufacturer of plastic products, with its principal place of business in Evansville, Indiana, all of which facts are admitted by the Respondent, and therefore conclude that, within the meaning of the Act, Respondent is an employer engaged in commerce.

I also find and conclude that the Union named in the caption hereof is a labor organization, a matter also admitted by the Respondent.

The Elections, Objections, and Challenges

In the first election, held March 31, 1964, 127 votes were cast for the Union and 140 were cast against. This election was set aside by the Regional Director on objections to Respondent's conduct affecting the election, by a report and order dated June 19, 1964. While Respondent in this case asserts that this was a valid election, and established the Union's lack of majority among the employees of the unit, this election's significance in this case is only secondary as the real thrust of the Respondent's position here is that the second or rerun election should have been set aside by the Regional Director on the objections filed by Respondent as to the conduct of the Union; also that if the Regional Director had not improperly determined that Olive Aulenbacher was a supervisor, and had permitted her to vote, and had resolved the other four challenges, the second election would have established that the Union lacked a majority; and that in this unfair labor practice proceeding Respondent has the right to offer evidence to establish the invalidity of the rerun election and the error of the Regional Director in his determination concerning objections and challenges to ballots.

Notwithstanding the Respondent's position that the first election was valid, it entered into an agreement for consent election, for the rerun election to be held March 31, 1964. There it agreed that a unit of the following employees was appropriate:

All production and maintenance employees employed at the Employer's Evansville, Indiana, plant, including leadmen and the truckdrivers; but excluding all office clerical employees, foreman, plant clerical employees, professional employees, guards, and supervisors as defined in the Act.

In the agreement for consent election Respondent committed itself to the proposition that "The determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election. . . ." The parties to the agreement for consent election also specifically agreed that objections to conduct affecting the results of the election could be filed with the Regional Director and that if filed, in the words of the agreement, "The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If the challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon. The method of investigation of objections and challenges including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding."

Pursuant to the provisions of this agreement for consent election the second election was held on July 1, 1964. The tally of ballots showed approximately 267 eligible voters, 1 void ballot, 122 votes cast for the Union, 117 votes cast against the Union, and 5 challenged ballots. The election was close enough to make the challenged ballots determinative of the results.

The Respondent filed timely objections to the Union's conduct affecting the election. Briefly summarized these objections alleged that the Union's campaign letters and circulars falsely indicated that numerous employee benefits would automatically result if the Union were selected as bargaining representative of the employees; and that the Union distributed among the employees untrue statements that (1) Respondent was in collusion with other plastic firms in the area to pay fabulous fees to counsel to defeat the Union's organization of Respondent's employees; (2) Respondent's employees were disloyal; (3) Respondent was unfair in promotions, layoffs, and recalls, (4) Respondent practiced favoritism, (5) Respondent caused insurance claims to be paid slowly; and (6) the election was unfair, being held in the summertime.

The Regional Director investigated the Respondent's objections to the conduct of the election. He also ordered a hearing on the five challenged ballots and the hearing was duly held on September 25, 1964, with the Union, Respondent, and Regional Director all participating.

At the request of the Regional Director both the Union and the Respondent submitted statements and evidence in support of their respective positions as to the

issues raised by the objections and their respective showings are referred to and reflected in the Regional Director's report on the objections in which he overruled them for reasons set forth in a comprehensive statement.

Following the hearing on the challenged ballots the Hearing Officer issued a report recommending that the challenge to the ballot of Olive Aulenbacher be sustained on the ground that she was a supervisor, and therefore not entitled to vote. The Regional Director affirmed this decision of the Hearing Officer and accepted his recommendation. Thus the tally of votes as previously stated, was not changed by the vote of Aulenbacher; and the Union's 5-vote lead in the tally of 122 votes for and only 117 against, could not be overcome by the remaining 4 challenged votes. Because these votes could not be determinative of the election however cast, the Hearing Officer, with the Regional Director affirming him, declined to resolve the challenges. The agreement for consent election provides, as appears in the excerpt quoted above, "*If the challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issues a report thereon.*" The emphasis is supplied. On December 7, 1964, the Regional Director certified the Union as the exclusive representative of the employees in the unit.

Respondent takes the position in this proceeding that it is entitled to offer evidence to prove the validity of the objections it filed to the rerun election and to relitigate the determination made by the Regional Director on the challenged ballots. Counsel for Respondent sought to call witnesses for such purpose. When denied the right so to proceed, and advised to make the record in this respect by an offer of proof, counsel sought to make the offer by question and answer. When denied this method, counsel made extensive offers of proof in narrative form, all of which were denied, for the reason that the evidence offered was essentially the same evidence, and related to the same issues, before the Regional Director in his investigation of Respondent's objections to the second election and in the hearing on the challenges to the five ballots.

Respondent's defense, as encompassed in the answer, the opening statement, the offers of proof and the brief, cannot fairly be interpreted to proffer newly discovered or previously unavailable evidence; or to rest on fraud, misconduct, or gross mistake such as to imply bad faith; or the claim that under the facts involved, as a matter of law, the election must be set aside. Authorities bearing on defenses such as these, therefore, have no application here.

Respondent's Refusal and Failure to Bargain

By letter dated January 6, 1965, the Union requested Respondent to meet and bargain with it on certain specified dates. On January 12, 1965, Respondent, replying to the Union's letter, set forth numerous reasons why it could not recognize the Union as the representative of its employees, or bargain with the Union. Such reasons all related to the alleged validity of the first election and the invalidity of the second and as asserted, the erroneous determinations made by the Regional Director with respect to Respondent's objections to the second election and the Union's challenge of the five votes. It is on the basis of this demand and the continuing refusal that the General Counsel filed the complaint.

The Determination of the Unfair Labor Practice

It is the well-established policy of the Board that in consent elections of the kind involved in this case, the Regional Director's determination is binding on the parties who signed the consent agreement and is final. An exception to this policy would permit a party who signed such an agreement to seek relief from the Regional Director's determination in case of fraud, gross mistake, or misconduct. Notwithstanding Respondent's assertion that the Regional Director's determinations in the instant case were capricious and erroneous, there is nothing in the record to suggest that this case falls within the stated exception which, in some of the cases, is also stated in terms of capricious, arbitrary action. While a decider of facts, other than the Regional Director, might have reached a different conclusion than the Regional Director did on the supervisory status of Aulenbacher, and the merits of Respondent's objections to the second election, there is no evidence here to indicate that such determinations were anything other than his sound judgment applied to the facts disclosed through his investigation of the objections and the hearing held on the challenge to the supervisor's vote. Thus, in reality, Respondent's defense is an attack on the Regional Director's judgment.

The Board rule, that binds the parties to their bargain in a consent-election agreement, is good. It expedites resolution of questions concerning representation; frees parties who choose to use it according to its purpose, of troublesome contests; and by virtue of interrelated protective rules, prevents *actual* miscarriage of fair and just

results. The detriment, if any, that the parties assume in return for the stated advantages, is the forfeiture of the right of review of the initial determination of questions such as these involved here—the merits of objections to an election and alleged supervisory status of an employee. When these matters are in dispute they nearly always involve close, difficult questions. The loss of right of review can hardly be of great consequence; for, if there were some way to measure it, the gain in accuracy as the decision moves up the procedural ladder from Regional Director to Trial Examiner to Board, would in all likelihood be negligible.

There are numerous Board decisions, quite uniformly supported by the courts, that delineate and apply the policy of the Board that denies a respondent in a case such as this, the right to litigate the matters resolved by the Regional Director, and that requires no further consideration on the merits of the issues that were before him. One such case, that seems to be controlling here, is *Howard, George, and Oliver Rippee d/b/a Pacific Multifirms Company*, 138 NLRB 796.

While Respondent claimed the right to litigate the objections and challenges in the absence of a hearing on the objections, on authority cited in the brief, none of which is deemed controlling or applicable in this situation, counsel for Respondent relied on another theory that is novel and somewhat inventive. The theory is this: that the Board in rendering the decision in *Bernel Foam Products Co., Inc.*, 146 NLRB 1277, adopted a policy that relieved unions of the binding effect of waiver, estoppel and an election of remedies, when confronted with a choice of proceeding to an election for representation with knowledge of the commission of unfair labor practices by the employer, or on the other hand proceeding in an unfair labor practice case; drawing an analogy to the situation of an employer who has signed an agreement for a consent election, and who thereby relinquished the right to procedures not specified in the consent election agreement, counsel for Respondent argues that the Board must in fair and equal treatment of employers and unions alike, now, by virtue of *Bernel Foam* relieve the employer, Respondent in this case, of the bargain it made when it signed the consent for the election. Notwithstanding such surface appeal as this theory may have, I find and conclude that the *Bernel Foam* doctrine has no application to the issues in this case.

In view of the foregoing, and inasmuch as the Respondent has declined to honor the certification of the Union, and has persistently refused to bargain with the Union, which I conclude is the exclusive representative of the employees of the unit, I find that Respondent has violated Section 8(a) (5) and (1) of the Act.

RECOMMENDED ORDER

On the foregoing findings of fact and conclusions of law and the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that the Respondent, Shawnee Plastics, Inc., Evansville, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and terms and conditions of employment with District 153 of the International Association of Machinists, AFL-CIO, as the exclusive representative of all employees in the following appropriate unit:

All production and maintenance employees at the Employer's Evansville, Indiana, plant, including leadmen and the truckdrivers; but excluding all office clerical employees, foreman, plant clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with the efforts of District 153 of the International Association of Machinists, AFL-CIO, to bargain collectively.

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

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant at Evansville, Indiana, copies of the attached notice marked "Appendix."¹ Copies of said notice, to be furnished by the Regional Director of Region 25, shall after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, and be main-

¹ In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "a 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".

tained by it for at least 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 material.

(c) Notify the Regional Director for Region 25, in writing, within 20 days from the date of receipt of this Decision, what steps it has taken to comply herewith.²

²In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 25, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a 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, upon request, bargain with District 153 of the International Association of Machinists, AFL-CIO, as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours and other conditions of employment, and, if an understanding is reached, embody such an understanding in a signed agreement.

WE WILL NOT interfere with the efforts of District 153 of the International Association of Machinists, AFL-CIO, to bargain collectively.

The bargaining unit is:

All production and maintenance employees employed at the Employer's Evansville, Indiana, plant, including a leadman and the truckdrivers; but excluding all office clerical employees, foreman, plant clerical employees, professional employees, guards, and supervisors as defined in the Act.

SHAWNEE PLASTICS, INC.,
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, 150 West Market Street, Indianapolis, Indiana, Telephone No. Melrose 3-8921.

Eureka Newspapers, Inc. and Teamsters, Warehousemen and Auto Truck Drivers Local 684, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. *Case No. 20-RC-6421. September 14, 1965*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Joe R. McCray of the National Labor Relations Board. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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 [Chairman McCulloch and Members Brown and Zagoria].