

American Finishing Company and Machine Printers and Engravers Association of the United States Independent. *Case 26-CA-2181. June 22, 1966*

DECISION AND ORDER

On April 29, 1966, Trial Examiner Thomas N. Kessel 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 Decision and a supporting brief. The Charging Party filed a reply 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 [Members Fanning, Brown, and Jenkins].

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 briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

[The Board adopted the Trial Examiner's Recommended Order with the following modifications:

[1. Add the following as a subparagraph to paragraph 2(a):

[All machine printers designated by us as assistant foreman and their apprentices at our Memphis, Tennessee, plant, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.]

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon a charge filed August 19, 1965, by Machine Printers and Engravers Association of the United States, herein called the Union, against American Finishing Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 26, issued his complaint dated August 31, 1965, alleging the Respondent's violation of Section 8(a)(5) and (1) of the Act. The complaint asserts the Union's certification as the exclusive collective-bargaining representative of an appropriate unit of the Respondent's employees following a secret-ballot election conducted under the Regional Director's supervision, the Union's subsequent request to the Respondent for collective bargaining on behalf of these employees, and the Respondent's unlawful refusal to accede to this request. The Respondent's answer concedes only that there was an election among the employees in the alleged appropriate unit and that the Union was thereafter certified as the representative of these employees. The appropriateness of the unit, the validity of the certification, and the Respondent's obligation to

honor it are, however, denied. In addition, the answer includes what is tantamount to the affirmative defense that the Respondent, because of certain conduct by the Union adverted to below, should be relieved of any bargaining obligation in this case. Moreover, the answer denies that the Respondent refused to meet and bargain with the Union pursuant to its request.

On September 15, 1965, the General Counsel filed a motion for judgment on the pleadings contending that the answer did not effectively deny the complaint allegations. That motion was referred for ruling to Trial Examiner Sidney Lindner who, on September 21, 1965, issued an order requiring the Respondent to show cause why the motion should not be granted. Replying to the order, the Respondent reiterated the averments of the answer and insisted that it had raised factual issues necessitating a hearing for their resolution. On December 2, 1965, Trial Examiner Lindner issued another order requiring the Respondent to clarify the defense that the Union by its "acts and conduct" is barred from rights under the Act. A response was filed to this order. On January 6, 1966, Trial Examiner Lindner issued an order denying the General Counsel's motion for judgment on the pleadings. Thereafter, upon notice from the Regional Director, a hearing was held before Trial Examiner Thomas N. Kessel on February 10, 1966, at Memphis, Tennessee. All parties were represented by counsel or other representative who were afforded full opportunity to participate in the proceeding. Ruling was reserved on the General Counsel's motion, renewed at the hearing, for judgment on the pleadings. That motion is disposed of by the findings and conclusions herein. Briefs received from the Respondent and the Charging Party after the close of the hearing have been carefully considered.

On the entire record in the case and from observation of the witnesses, I make the following:

FINDINGS OF FACT

I. COMMERCE DATA

The complaint alleges and the answer admits that the Respondent is a Tennessee corporation engaged at Memphis, Tennessee, in the processing and finishing of textiles; that during the year preceding issuance of the complaint the Respondent manufactured and shipped goods and products from its place of business across State lines valued in excess of \$50,000. I find from the foregoing that the Respondent is an employer engaged in interstate commerce within the meaning of the Act and that the purposes of the Act will be effectuated by the Board's assertion in this case of jurisdiction over the Respondent's operations.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent denies the allegation that the Union is a labor organization within the meaning of the Act. In conjunction with this denial the answer avers the Union's commission of "such acts and conduct as bars the Union from having any rights under the Act."

The Union's status as a labor organization is clear. It admits employees to membership and obviously exists for the purpose of bargaining with their employers concerning terms and conditions of employment as it sought to do with the Respondent in the instant case. By the plain language of Section 2(5) of the Act the Union indisputably qualifies as a labor organization. With this the Respondent does not appear to disagree. The attack upon the Union's status, as argued at the hearing, is that the Union ceased to be a labor organization when, as it assertedly does now, it included in its contracts negotiated with other employers terms of employment for employees as well as supervisors. I accord no merit to this contention. Whatever may be argued about the validity of labor contracts which cover employees and supervisors, this does not logically pertain to the status as a labor organization of the union which negotiated such contracts. Furthermore, I note that in the representation proceeding in Case 26-RC-2361, with which this proceeding is "one," (see *Pittsburgh Plate Glass Company v. N.L.R.B.*, 313 U.S. 140, 161-162) the Respondent did not raise the foregoing issue in its request to the Board for review of the Regional Director's Decision of Election. The Union was there accorded status as a labor organization. The Respondent is now precluded by operation of Section 102.67(f) of the Board's Rules and Regulations from litigating the Union's status as a labor organization. In accordance with the determinations of the Regional Director and the Board I find that the Union is a labor organization within the meaning of the Act.

The contention that the Union is barred by its conduct from exercising rights under the Act is actually a justification asserted by the Respondent for its refusal to bargain with the Union rather than an attack upon the Union's status as a labor organization. This matter will be discussed in section III, below.

III. THE UNFAIR LABOR PRACTICES

For purposes of this case I have noticed the Board's official records in Case 26-RC-2361. These records show the following:

Pursuant to a representation petition filed by the Union in the foregoing case a formal hearing was held at which a factual record was made concerning the issues raised by the Union and the Respondent. Thereafter, the Regional Director issued his Decision and Direction of Election for the conduct of a representation election among a unit of the Respondent's employees consisting of "all machine printers designated by the Employer as assistant foremen and their apprentices at the Employer's Memphis, Tennessee, plant, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act" In his decision the Regional Director had expressly considered and rejected the Respondent's contentions that the petition for election should be dismissed on the ground that the Respondent had a labor contract with another union covering the employees in the foregoing appropriate unit which was a bar to the proceeding, and on the further ground that the unit sought for representation was not appropriate because the employees included therein were all supervisors. The Respondent subsequently filed a request with the Board for review of the Regional Director's decision contending therein that he had erred with respect to his rejection of the Respondent's contract bar and appropriate unit contentions. On June 17, 1965, the Board telegraphically notified the Respondent that its request for review was denied because it raised no substantial issues warranting review. An election was thereafter held on June 23, 1965, at which the eight employees who voted unanimously selected the Union as their representative. The Respondent filed objections to the election on the grounds, among others, that the employees who voted were supervisors and that the election was barred by the aforementioned contract. The Regional Director subsequently issued his Supplemental Decision and Certification of Representative, dated July 1, 1965, in which he found all the Respondent's objections to be without merit and accordingly overruled them. At the same time he certified the Union as the collective-bargaining representative of the Respondent's employees in the aforescribed appropriate unit. The Respondent then filed with the Board exceptions to the Regional Director's Supplemental Decision and Certification of Representative and again contended that the Regional Director had erred in failing to find that the employees involved were supervisors and that the proceeding was barred by an existing contract. On August 5, 1965, the Board telegraphically notified the Respondent that its request for review of the Regional Director's Supplemental Decision and Certification of Representative was denied, because it raised no substantial issues warranting review.

The complaint alleges that since on or about August 9, 1965, and continuing to date the Union has requested and is requesting the Respondent to bargain collectively with respect to terms and conditions of employment for the employees in the unit for which the Union was certified as the exclusive bargaining representative, and that from August 11, 1965, the Respondent has refused and continues to refuse to honor the Union's bargaining request. The Respondent's answer denies these allegations. As to the alleged request to bargain, the Respondent's answer admits that it had received a letter dated August 9, 1965, from Attorney Woods as representative for the Union requesting a meeting to negotiate a labor contract and that on August 11, 1965, William W. Goodman, chairman of the Respondent's board, replied to Woods' letter as follows:

I received your letter of August 9, 1965, requesting a meeting between representatives of Machine Printers and Engravers Association of the United States and Management of American Finishing Company to negotiate the terms and conditions of a collective bargaining agreement for the machine printers and apprentices employed by American Finishing Company.

On August 30, 1965, I am leaving the city and I will be out of the country until December 13, 1965.

As we have advised the National Labor Relations Board, you, and Mr. Lindberg:

1. the election was not properly directed;
2. each of the employees is a supervisor;

3. an existing contract between the American Finishing Company and The Textile Workers Union of America, AFL-CIO, dated January 15, 1963 as amended June 28, 1964, is and was a bar to the election;
4. the unit, as proposed, is and was inappropriate;
5. the exceptions of American Finishing Company to the Regional Director's Supplemental Decision and Certification of Representatives should have been sustained, and the Regional Director's Supplemental Decision and Certification of Representatives should have been set aside by the National Labor Relations Board.

We are still of the same opinion and position.

The answer asserts that apart from Woods' letter no other request to bargain collectively has been made by the Union. The answer adds, however, that the Respondent "does refuse to recognize the Union as the exclusive bargaining representative of any of the employees of American Finishing Company, and the reasons for its refusal are set out above (as stated in the Respondent's answering letter to Woods' request)."

At the hearing in the instant case the Respondent persisted in its position that its August 11 letter did not constitute a rejection of the Union's request to bargain. Respondent's counsel argued that the letter should be construed as a notification only of the Respondent's unwillingness to meet at that particular time because of Goodman's absence from the country from August 30, 1965, until December 13, 1965. Counsel would not acknowledge that the letter was properly construable as a refusal to meet with the Union at any time for the reason that the Union, as stated in the letter, had been improperly certified as the representative of its employees. I had declared at the hearing, after listening to argument, that the Respondent's answer constituted an admission of its refusal to meet and bargain with the Union. Upon further consideration of all the circumstances I am satisfied that the Respondent's August 11, 1965, letter is a clear refusal to grant the Union its request to meet with the Respondent and to negotiate a contract with it because of the Respondent's unwillingness to accept the validity of the Board's certification of the Union as the representative of its employees.

It is appropriate here to note that I am in this case bound by the Board's determinations in the representation proceeding in Case 26-RC-2361 and may not permit the parties to relitigate any issue which has already been considered and passed upon by the Board in the representation proceeding unless the parties rely for such purpose upon evidence newly discovered or not previously available. See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, *supra*; *National Survey Service, Inc.*, 151 NLRB 783, *enfd.* 361 F.2d 199 (C.A. 7); *Sun Drug Co., Inc.*, 147 NLRB 669, *enfd.* 359 F.2d 408 (C.A. 3). Accordingly, I did not at the hearing in the instant case permit litigation of the defenses in the answer contained in paragraph 7 attacking the validity of the Regional Director's and the Board's determinations in the representation proceeding absent a showing of newly discovered or previously unavailable evidence. The Respondent claimed it had such evidence on which it would rely to attack the Regional Director's and the Board's appropriate unit findings. As noted in the Regional Director's Decision and Direction of Election the Respondent had contended in the representation proceeding that the unit sought by the Union "is inappropriate as the printers are not craft employees but are an integral part of production." The Regional Director disagreed and found that the printers in question did have craft status. Explicating this finding the Regional Director had pointed out that the contention advanced by the Respondent was the same as that which had been litigated in prior proceedings involving this Respondent and the Union in *American Finishing Company*, 86 NLRB 412 and 90 NLRB 1786. The Regional Director had stated that "a careful study of both prior cases and of the record, exhibits, and briefs in this proceeding reveals that the printers have basically the same duties and responsibilities they had at the time of the first hearing. From a close analysis of all the evidence on the issues of their supervisory and craft status I am convinced there is no material difference in their status now warranting a conclusion different from that found by the Board in prior cases." The Board, as reflected by its denial of the Respondent's request for review of these findings by the Regional Director, also held that the printers had craft status. The Respondent's claimed newly discovered evidence would have attacked the findings as to the craft status of the printers. Counsel for the Respondent declared that if the aforementioned Goodman were permitted to testify, he would testify that subsequent to the hearing in the representation case he took a trip abroad and coincidentally

visited printing plants in Poland, the Philippines, and Hong Kong. While in these plants he acquired information indicating that the machine printers employed there require approximately 4 months' training and that there is no apprentice program in these plants. This testimony assertedly would be relevant to the finding in the representation proceeding that a 7 years' apprenticeship had to be served before an employee could become a machine printer and properly operate the Respondent's machines. I indicated to counsel at the hearing that I did not regard the foregoing information acquired by Goodman as newly discovered or previously unavailable evidence within the meaning of these terms. I adhere to this view. See *United States Rubber Company*, 155 NLRB 1298. The information concerning the foreign plants visited by Goodman was by its very nature available before and during the representation proceeding. It did not become "newly discovered" or "previously unavailable" merely because Goodman chanced to learn it while traveling for undisclosed reasons without a showing that the information could not have been obtained before then by the exercise of reasonable diligence. No such showing was made. I also had indicated that Goodman's information would not affect the result in the representation case, meaning that the information at best would only be cumulative. In view of the thoroughness with which the craft status of the Respondent's machine printers was litigated in Case 26-RC-2361 and in the earlier representation proceedings, hereinabove cited, I am convinced that this is so. Giving the Respondent the full benefit of Goodman's information as if it had been received in evidence as testimony I find that it is insufficient to warrant alteration of the Regional Director's and the Board's appropriate unit finding in the representation proceeding.

Apart from the foregoing, the Respondent made no claim that it had any other newly discovered or previously unavailable evidence on which it would rely to attack any determination by the Regional Director or by the Board in the representation proceeding. Accordingly, no litigable issue was raised by the answer's attack on the Board's determination in Case 26-RC-2361. There remained, therefore, only one other item requiring litigation at the hearing, namely the Respondent's averment that the Union had committed conduct which barred it from having rights under the Act. The Respondent was given full opportunity to prove this defense.

The aforementioned William W. Goodman offered testimony the purport of which is that the only reason which prompted the Union to organize the Respondent's employees and to become their collective-bargaining representative is the conspiracy it had entered with other companies who are the Respondent's competitors to put the Respondent out of business or to make it less competitive. Asked what evidence he had to support this accusation, Goodman reasoned that because the Union represents the printers in competing firms who have many more printing machines than the Respondent has in its plant and because the Union "had spent weeks and weeks of time and thousands of dollars in an attempt to organize eight people" that this "on the face of it would not possibly be justified merely for the purpose of adding eight additional members of this Union. They could only justify it because of the protection that it would give to these larger units that they have in these other plants." As further evidence of the alleged conspiracy Goodman testified that the Union would in the course of bargaining ask the Respondent to sign a contract which would provide coverage for supervisors as well as rank-and-file employees. Pressed to give evidence which would be something more than the foregoing speculation and reasoning in which he indulged, Goodman testified that he had been told by the vice president of the Union in the morning of the hearing "that it looks like you are hurting Santee (referring to a competitor of the Respondent), or getting business from Santee, who has eight print machines and who has a contract with this Union." Whatever this latter enigmatic statement may have meant to Goodman it hardly qualifies as evidence to support an accusation in this proceeding that the Union had not for legitimate reasons organized the Respondent's employees and was not for proper reasons seeking to bargain collectively in their behalf with the Respondent. Nothing produced by the Respondent at the hearing supports the accusation or the defense in the answer that the Union had engaged in acts and conduct which barred it from exercising rights under the Act.

I find that on August 9, 1965, the Union was the certified representative of the Respondent's employees in the above-described appropriate unit and that it requested the Respondent to bargain collectively with it on that date, but that the Respondent on August 11, 1965, refused without justification and continues to refuse to bargain with the Union pursuant to its request. By this refusal the Respondent has violated Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent 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 Respondent has engaged in certain unfair labor practices I will recommend that it be ordered to 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. American Finishing Company, is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Machine Printers and Engravers Association of the United States is a labor organization within the meaning of Section 2(5) of the Act.

3. On and since June 23, 1965, the Union was and has been the representative for purposes of collective bargaining of a majority of the Respondent's employees in the appropriate unit hereinabove described. Said unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit on or about August 11, 1965, and thereafter, 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.

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

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that American Finishing Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to bargain collectively with Machine Printers and Engravers Association of the United States as the exclusive collective bargaining representative of its employees in the appropriate unit hereinabove described.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request bargain collectively with Machine Printers and Engravers Association of the United States as the exclusive representative of all the employees in the appropriate unit hereinabove described with respect to 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 Memphis, Tennessee, the attached notice marked "Appendix."¹ Copies of said notice, to be furnished by the Regional Director for Region, shall, after being duly signed by an authorized representative of the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 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.

¹In the event that this Recommended Order is 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 is 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."

(c) Notify the Regional Director for Region 26, in writing, within 20 days from the receipt of this Decision, what steps it has taken to comply therewith.²

² In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 26, 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 upon request bargain with Machine Printers and Engravers Association of the United States as the exclusive collective-bargaining representative of the employees in the appropriate unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

The appropriate unit is:

All machine printers designated by us as assistant foremen and their apprentices at our Memphis, Tennessee, plant, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

AMERICAN FINISHING COMPANY,
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, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee 38103, Telephone 534-3161.

Schneider Mills, Inc. and Jimmy and Josh, Inc. and Textile Workers Union of America, AFL-CIO. Case 11-CA-2985. June 23, 1966

DECISION AND ORDER

On May 10, 1966, Trial Examiner George J. Bott issued his Decision in the above-entitled proceeding, granting the General Counsel's Motion for "Judgment on the Pleadings," and finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended. The Trial Examiner recommended that the Respondent cease and desist from such unfair labor practices 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 Act, the National Labor Relations Board has delegated its powers in connection with