

**Burroughs Corporation and International Union,
United Automobile Aerospace and Agricultural
Implement Workers of America. Cases
29-CA-1024 and 29-CA-1515**

December 16, 1969

DECISION AND ORDER

**BY CHAIRMAN McCULLOCH AND MEMBERS
BROWN AND ZAGORIA**

On August 19, 1969, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding the 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. He further found that Respondent had not engaged in certain other unfair labor practices and recommended that such allegations be dismissed. Thereafter, the Respondent, the General Counsel, and the Charging Party filed exceptions to the Trial Examiner's Decision. The Respondent and the General Counsel filed briefs in support of their exceptions. The General Counsel also filed a brief in support of the Trial Examiner's Decision.

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.

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 this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner for the following reasons.

For the reasons stated in the Trial Examiner's Decision, we find that Respondent violated Section 8(a)(5) and (1) of the Act by refusing on and after December 22, 1966, to recognize and bargain with the Union for the employees in the certified unit. In any event, as Respondent refused to bargain and committed various other unlawful acts subsequent to the Board's decision clarifying and amending the previously certified unit,¹ we find for the reasons stated below, that by refusing to bargain with the Union as the representative of employees in the certified unit on and after October 21, 1968, Respondent violated Section 8(a)(5) and (1) of the Act.

On September 19, 1968, the Board issued its decision in the aforesaid UC-AC proceeding and ordered that:

... the certification issued to the UAW in Case 29-RC-320 be, and it hereby is, clarified and amended to reflect the facts that the New York City branch has been renamed the New York Commercial Branch, and that the service employees assigned to the New York Financial, Queens and Westchester branches of the Employer's New York District are included in the certified unit.²

Thereafter, by letter dated October 21, 1968, the Union requested that it be recognized in all four branches, and by letter dated November 6, 1968, the Respondent refused. During this same period and subsequent to the Board's decision in the UC-AC proceeding, the Respondent refused to furnish the Union with data relating to the names, addresses, job classifications, branch assignments, rates of pay, dates of last salary increase, and related matters pertaining to all the employees in the unit involved. In addition, during this period Respondent unilaterally increased employee benefits when it assumed the full cost of hospital and medical-surgical insurance coverage for employee dependents of all of the service employees in the unit without prior notice to the Union and without having afforded them an opportunity to negotiate and bargain with Respondent concerning such change in their terms and conditions of employment.

In defense of its actions Respondent contends that the Board was wrong in its clarification and amendment of the unit in that it was arbitrary and capricious and denied the employees their protected right to vote for or against the Union. In challenging the Board's decision, the Respondent insists that each of the branches of its business constituted a separate, autonomous, and distinct appropriate unit. In addition, Respondent contends that it had a good-faith doubt as to the Union's representative status inasmuch as the certification year had passed and a decertification petition had been filed which raised a question concerning representation.³

We find no merit in Respondent's defenses. With respect to Respondent's contention that it had a good-faith doubt as to the appropriateness of the unit, it is well settled that "good or bad faith is irrelevant where an employer's refusal is bottomed upon reasons other than those related to the union's majority status."⁴ Furthermore, the Board has made it quite clear that good faith doubt as to the appropriateness of a unit based on an erroneous view of the law is not available as a defense to a refusal-to-bargain charge.⁵

¹*Id*

²*Burroughs Corporation*, Case 2-RD-702

³*H & W Construction Company, Inc.*, 161 NLRB 852, and cases cited therein.

⁴*H & W Construction Company, Inc.*, *supra*. See also *Old King Cole, Inc v N L.R.B.*, 260 F.2d 530, 532 (C.A. 6); *Tom Thumb Stores, Inc.*, 123 NLRB 833. For reasons set forth in the decision clarifying the unit (172 NLRB No. 247), we find no merit in Respondent's contentions that the clerical unit is not an appropriate unit for purposes of collective

¹*Burroughs Corporation*, 172 NLRB No. 247.

It is also well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption its majority representative status continues.⁶ This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees.⁷ Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The *prima facie* case may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal a majority of the unit employees no longer desired representation by the Union; or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status.⁸ As to the second of these, i.e., "good-faith doubt," two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations⁹ and it must not have been raised in the context illegal antiunion activities, or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union.¹⁰

Respondent here does not contend that it has rebutted the presumption of majority status of the Union; it contends, rather, that it has demonstrated that it had reasonable grounds for doubting that the Union continued to enjoy majority support. Upon analysis, however, we find that Respondent's contentions in this regard cannot be divorced from its objection to the appropriateness of the unit determined by the Board in the UC-AC case. In other words, in asserting its good-faith doubt of the Union's majority Respondent is obliged to rely on its own view that each of its branches constitutes an appropriate unit. Thus, Respondent argues that inasmuch as the election resulting in the original certification in the Commercial branch was won by a vote of 107 to 64 and that shortly thereafter 86 of these employees were transferred to the Financial branch, Respondent had reasonable grounds for doubting the Union's majority at that branch because it was possible that the 86 transferees included all or a substantial number of the 64 employees who voted against the Union. On somewhat the same basis when employees were later

transferred from the Commercial to the other two new branches, the Respondent asserts it had a good-faith doubt in each instance as to the Union's majority. It is theoretically possible, though unlikely, that all 64 of the employees transferred from the Commercial to the Financial branch might have been those who voted against the Union. If such were the case, then the employees remaining in the Commercial branch undoubtedly would have all been union supporters except possibly those few who did not vote in the election. On the other hand, it is as possible that all of the employees transferred to the Financial branch were union supporters and that the Union thus lacked a majority in the certified unit. Respondent does not explain why it chose one of two equally plausible — and equally unlikely — possibilities upon which to act. The answer is plain, it was acting on the basis of its conviction that the Union's certification ran only to the Commercial branch and not to new branches carved out of it. This is confirmed by the Respondent's admitted refusal to recognize the Union as the bargaining representative of the employees in the Queen's branch despite the fact that a majority of the employees at that branch advised Respondent that they wished to continue to be represented by the Union as well as by the realities of the situation which would indicate that in the absence of evidence that employees who transferred out of the bargaining unit are of one persuasion or another, the mix of union and nonunion supporters is presumed to continue unchanged.

We conclude, therefore, that Respondent's refusal to bargain with the Union was not based on a good-faith doubt of the Union's majority status, but upon the conviction that its bargaining obligation was limited to the Commercial branch.

In that conviction Respondent was in error¹¹ whether or not the Union held a majority in each of the various branches. In the UC-AC case, we determined that the appropriate unit is made up of the four branches. Prior to the fragmentation of the original branch by the Respondent a majority of the employees had voted for the Union, and we discern nothing in the record to rebut the presumption that this majority continued thereafter. Nor does the record disclose a reasonable basis for a good-faith doubt of the Union's majority in the amended and clarified unit. Respondent points to the decertification petitions, but they were filed after Respondent's actions carving up the certified unit and its refusal to continue to recognize the Union as the representative of all unit employees occurred.

⁶bargaining

⁶*Celanese Corporation of America*, 95 NLRB 664, 671-672.

⁷*Id.*

⁸*Id.* See also *Ingress-Plastene, Inc.*, 177 NLRB No. 70; *Terrell Machine Company*, 173 NLRB No. 230; *C & C Plywood Corporation, et al.*, 163 NLRB 1022.

⁹See *Laystrom Manufacturing Company*, 151 NLRB 1482, 1484, enforcement denied on other grounds (sufficiency of evidence) 359 F.2d 799 (C.A. 7); *Ingress-Plastene, Inc.*, *supra*; *Terrell Machine Company*, 173 NLRB No. 230; cf. *United States Gypsum Company*, 157 NLRB 652.

¹⁰*Celanese Corporation of America*, *supra* at 673. See also *Ingress-Plastene, Inc.*; *Terrell Machine, supra*; *Bally Case and Cooler, Inc.*, 172 NLRB No. 106; *enfd.* 416 F.2d 902 (C.A. 3), *C & C Plywood Corporation et al.*, 163 NLRB 136.

¹¹The fact that Respondent's conviction was not unreasonable in the light of the Regional Director's unit determination in Case 29-RC-320 and the General Counsel's refusal to issue a complaint on the charge alleging a refusal to bargain as to the Financial branch does not justify Respondent's later refusal to bargain after the unit was clarified to include the Commercial branch and the other branches carved out of it by Respondent's transfer of employees.

Moreover, we have found that Respondent's refusal to recognize the Union as the representative of employees in the new branches was not based on a doubt of majority status but on its views concerning the appropriateness of separate bargaining units, views which were found to be in error in the UC-AC proceeding, which finding we have reaffirmed herein.

Accordingly, we find that Respondent has not rebutted the presumption flowing from the Union's certification, and we find that Respondent by refusing to bargain with the Union on or about October 21, 1969, in unilaterally assuming the payment of medical insurance premiums and in refusing information to the Union necessary for collective bargaining violated Section 8(a)(5) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent, Burroughs Corporation, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

MEMBER ZAGORIA, concurring:

I concur in the result.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

E. DON WILSON, Trial Examiner: Upon a charge in Case 29-CA-1024 filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, herein jointly and separately with its Local 365 called the Union, and sometimes the former is called the UAW or parent and the latter is called the Local, on June 22, 1967, and amended on June 29, 1967, and upon a charge filed by the Union in Case 29-CA-1515, on November 12, 1968, the General Counsel of the National Labor Relations Board, herein the Board, issued an Order Consolidating Cases, Complaint and Notice of Hearing on February 28, 1969, and an amendment to the Complaint deleting paragraph 25, thereof, on May 12, 1969, alleging that Burroughs Corporation, herein Respondent, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, herein the Act.¹

Pursuant to due notice, a hearing in this matter was held before me at Brooklyn, New York, on May 20 and 21, 1969. The parties fully participated and filed briefs which have been duly considered.

Upon the entire record² in the case and from my observation of the witnesses, I make the following:

¹During the hearing, General Counsel amended the wording of portions of the complaint and Respondent amended portions of his duly filed answer.

²The Charging Party's unopposed motions to offer letters dated June 30, 1966, and March 30, 1966, and to correct the transcript, have been received and are granted. They are contained in one document with the letters attached. They are marked T.X. Exh. 1.

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

At all material times, Respondent has been a Michigan corporation, with its principal office in Detroit, Michigan, and it maintains places of business in various other States, where it engages in the manufacture, sale and distribution and installation and service of business machines and related products. During the past year, which is representative of its annual operations, it manufactured, sold, and distributed at its places of business, products valued in excess of \$50,000 which were shipped from said places of business directly to States of the United States other than the State in which said places of business are located.

At all times material, Respondent has been an employer engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATIONS

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 365, each and both of which are called the Union herein, are labor organizations within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Issues*

Did Respondent violate Section 8(a)(5) and (1) of the Act by unlawfully refusing since December 22, 1966, to recognize and bargain with the Union as the certified representative of Respondent's employees at its Financial, Queens and Westchester branches in the New York City area as they came into existence; and did Respondent unlawfully interrogate employees concerning their activities on behalf of the Union on or about August 8, 1968?

B. *The Facts as to the Unlawful Refusal to Bargain*

Many of the facts I shall find herein have already been found by the Board in Cases 29-UC-9 and 29-AC-5, reported at 172 NLRB No. 247, involving the Union and Respondent. Respondent properly recognizes that this decision of the Board is binding upon me, although its counsel maintains the Board was in error in its decision and was arbitrary and capricious.

On January 11, 1966, the Union's parent, the UAW, was certified as the bargaining representative of Respondent's employees in the following unit:

Includes: All field service engineers, including field engineers 1, field engineers 2, field engineers 3, and field engineers 4, sorter specialists, stockroom clerks, shipping room clerks and receiving room clerks employed by Burroughs Corporation, at its branch office in New York, New York.

Excludes: Office clerical employees, sales representatives, sales technical personnel, all other employees, watchmen, guards and supervisors as defined in the Act.³

³The UAW assigned to the Local the right to bargain for the employees in the unit on behalf of the UAW and itself.

The election resulting in the certification of January 11, 1966, had a vote of 107 for the UAW and 64 against.

Soon after the certification, the parties began negotiations concerning the only branch then in question, the Commercial branch. Early in February 1966,⁴ Respondent advised the Union it intended to open a branch, herein, as in the Board's decision, *supra*, called the Financial branch and assign approximately 86 unit employees to the so-called new branch. The Union requested Respondent to recognize it as the bargaining representative of the employees at the Financial branch. Respondent refused. As found by the Board, the UAW filed an 8(a)(5) charge in Region 2, on March 15, 1966, because of this refusal to bargain. The Regional Director dismissed the charge and the General Counsel denied an appeal on July 19, 1966. The Financial branch was opened on April 11, 1966, and Respondent still refused to bargain with the Union as the representative of the employees at this branch, about 86 in number.

On July 13, 1966, Respondent and the Union executed a contract covering the employees of only the Commercial branch. Of course, Respondent refused to recognize the Union as the representative of the Financial branch employees at that time and the Union took the best it could get, under the circumstances. The contract contained a union security clause as well as checkoff provisions. While Article XXIV of the contract contained a "general" waiver clause, there is no evidence that Respondent ever relied on this clause in its continuing refusals to bargain with the Union as to the so-called "new branches" it "carved out" of the certified unit. In refusing to bargain with the Union concerning the Financial branch employees, Respondent contended it did not consider that branch as part of the certified unit and it had a good faith doubt, particularly because of the numerical results of the election, that the Financial branch employees wished to be represented by the Union. Respondent offered to enter into a consent election agreement as to the Financial branch, which offer the Union refused, insisting it was the certified bargaining representative.

On February 13, 1967, Respondent opened its so-called Queens branch to which it assigned eight or nine field engineers from the Commercial branch. The Union demanded bargaining recognition as the representative of these employees. Respondent refused. About a week later, six of the eight or nine Queens employees, during working hours, visited a management representative at the Commercial branch and stated they desired and wanted Respondent to recognize the Union as bargaining representative at the Queens branch. Respondent, through its district manager, Kuhn, refused.⁵ The Union requested recognition for the Queens branch, with some fruitless discussion about a consent election, but Respondent refused recognition and bargaining.

As the Board has already found, "On June 16, 1967, after the Petitioner gave timely notice to terminate its 1-year contract, the Employer informed the Petitioner that it intended to create a new branch office in Westchester County for another segment of the Commercial branch and transfer to it the 10 unit employees who serviced accounts in that segment." Respondent again refused recognition of the Union as bargaining representative of

these employees on the grounds that the Westchester branch was not a part of the certified unit and that Respondent had a good faith doubt that the Westchester employees wished to be represented by the Union. It again offered to enter a consent election agreement. On June 22, 1967, the same date the original charge in this case was filed, the Union filed the UC-AC petitions resulting in the Board decision referred to, *supra*.

In June 1967, according to the credited testimony of Allan De Lorenzo, the UAW international representative, he asked the management representative at a bargaining conference that if the Union produced a sufficient amount of cards in Westchester and Queens, would Respondent recognize the Union. Respondent, through its representative,⁶ stated it would not and that the only way the Union could represent the employees in Queens, Westchester and the Financial branch was to win an election at each of those branches. Rozier insisted that when they transferred men to a new branch they were no longer considered part of the certified unit and Respondent would not recognize the Union as bargaining representative at any of the new branches. Each time Respondent opened a new branch, Financial, Queens, Westchester, the Union claimed each was a part of the bargaining unit for which it was the certified bargaining representative and demanded recognition and bargaining and Respondent refused, claiming that each so-called new branch was a separate unit and that it would recognize the Union as the representative of the employees at each of these so-called new branches only as a result of separate elections.⁷ Respondent refused to consider a card check in each instance.

On June 22, 1967, the Union filed its UC petition and the original charge herein. On June 29, 1967, the Union filed the AC petition which was consolidated with the UC and resulted in the Board decision, *supra*.

James Corbett, a member of the Union's negotiating committee, testified credibly⁸ that in June and July 1967, the Union demanded and was refused recognition as the bargaining representative of the Financial branch and Queens and Westchester branches, until such time as the unit was clarified.⁹ The Union demanded, pending the outcome of Board litigation, that it wanted employees of all branches treated as union members, with dues deductions until such time as the legal action was settled.

On September 29, 1967, 29-RD-702 seeking to decertify the Union as the representative of the Commercial branch, was filed.¹⁰

Rozier testified that from the time the General Counsel sustained the Regional Director's dismissal of the Union's 8(a)(5) charge on July 19, 1966, until the Union filed its first amended AC petition on November 1, 1967, the Union made no claim for recognition at the Financial branch. As noted, this testimony was credibly contradicted by Corbett, and Rozier, himself, clearly and unequivocally

⁴Rozier.

⁵Respondent also claimed a good-faith doubt of majority.

⁶His demeanor impressed me favorably.

⁷Note that throughout the transcript the reporter improperly used "classified" rather than "clarified." I was not pleased with the reporter's lateness in arrival at the hearing and other aspects of his reporting. It was stated by me that it was quarter after ten and not quarter after eleven that the parties discussed an interest in settlement discussions. I should expect that a reporter in an area which has all the rapid transit facilities such as New York City, would arrive on time for a hearing. It may be that the Board will seek to bring this to the attention of the CSA Reporting Company. All the parties arrived at the hearing on time.

⁸It was subsequently dismissed.

⁴Note that the 10(b) cutoff date is December 22, 1966.

⁵Respondent obviously knew from this meeting that the Union represented a majority in Queens.

replied to the Trial Examiner's question that at *all times* since February 1966 the Union claimed to be the representative of Respondent's employees at its Financial branch. He further testified that at *all times* Respondent has refused to recognize the Union's demand for recognition at the Financial branch.

I find that as the Financial, Queens and Westchester branches opened the Union demanded bargaining and since the particular dates has continued to demand bargaining rights, and Respondent has consistently and at all material times refused. In the negotiations culminating in the execution of the contract from December 1, 1967, to August 8, 1968, Rozier testified that the Union demanded that the Financial, Queens and Westchester branches be included within the bargaining unit to be covered in the contract. Respondent refused. The same was true for the August 15, 1968, to August 15, 1969, contract.

The three contracts executed by the parties had identical recognition, union security and waiver provisions. Allan De Lorenzo, the Union's international representative, credibly testified that the Union has always enforced the union security provisions of the contracts.

The Board, in its decision, found that the service employees transferred to the new branch offices remained part of the original certified unit. The Board found that the transferred employees continued to share a community of interest with those who remained attached to the original New York Commercial branch office. The Board ordered that the certification issued to the Union in 1966 he clarified and amended "to reflect the facts that the New York City branch has been renamed the New York Commercial Branch, and that the service employees assigned to the New York Financial, Queens and Westchester branches of the Employers New York District are included in the certified unit."¹¹

After the Board's decision, *supra*, the Union requested that it be recognized at all four branches, on October 21, 1968, and on November 6, 1968, Respondent refused.

On October 24, 1968, a first amended decertification petition was filed covering the four branches. It was dismissed in March 1969.

On November 12, 1968, the Union filed the charge in 29-CA-1515, alleging a continued refusal to bargain in the certified unit, as amended and clarified.

Respondent raises a number of reasons for its refusals to bargain with the Union. It primarily contends that the Board, in its decision, *supra*, was wrong in that it was arbitrary and capricious, and denied the employees their protected right to vote for or against the Union. It points out that 64 employees had voted against the Union in the election resulting in the original certification and it did not know which of these employees were transferred to the branches. It further contends that an original and amended decertification had been filed, further raising a good faith doubt as to the Union's representative status. In disagreeing with the Board's decision, Respondent insists that each of the branches was autonomous and constituted a separate and distinct appropriate unit. It further claims that the Union over a long period of time abandoned its claim to represent the employees at the Financial branch. At all times, Respondent insisted that each new branch as it opened was not a part of the certified unit. Of course, Respondent has consistently refused to bargain about any of the new branches, but the

Respondent points out that the contracts with the Union have covered only the Commercial branch.¹² Respondent contends that the dismissal of the RD petitions was erroneous, claiming a question of representation existed.

Concluding Findings as to Refusals to Bargain

I find, as stated by the General Counsel in his brief that:

From April 11, 1966 to February 13, 1967 the Commercial and Financial branches constituted an appropriate unit for purposes of collective bargaining; from February 13, 1967 to July 3, 1967 the Commercial, Financial and Queens branches constituted an appropriate unit for purposes of collective bargaining; since July 3, 1967 the Commercial, Financial, Queens and Westchester branches have constituted an appropriate unit for purposes of collective bargaining; the Union has, at all times since April 11, 1966 been the certified representative of these appropriate units, which at all times constituted the certified unit of January 11, 1966.

I find the Board's decision makes the above finding abundantly clear and correct. The Board refers to the three new branches as having been *carved out* of the certified unit.¹³ As I read the Board's decision, it found that as each new branch was carved out, the employees remained part of the certified unit.

I note that the Board clarified and amended the Union's certification. If a question concerning representation had existed, it would have dismissed the UC and AC petitions. Cf. *General Electric Company*, 127 NLRB 724; *United Aircraft Corporation*, 124 NLRB 392; *Mississippi Lime Company*, 124 NLRB 884.

I find that as each new branch opened, the Union demanded bargaining for the branch employees. I find that the Union has at all times sought bargaining rights at each of the four branches since the times they opened. I find, based on the entire record, that the Union never waived or abandoned its claim to be the bargaining representative of the Financial branch employees. There is a "general waiver" clause in each of the contracts covering the Commercial branch. The Board had the first two contracts before it and obviously found no waiver by the Union to represent the employees at each of the four branches.¹⁴ I find it abundantly clear that the Union did "not clearly and unmistakably" waive its statutory right to be recognized as the bargaining representative at each of the four branches which were part of the unit for which it was certified. It is clear from the record that continuously since December 22, 1966, Respondent has refused to recognize the Union as bargaining representative at any branch other than the Commercial. It is particularly as to the Financial branch that Respondent claims waiver or abandonment by the Union. I cannot ignore the testimony of Rozier, Director of employee relations for Respondent, to the Trial Examiner, alluded to above, that *at all times* since February 1966, the Union has claimed to be the representative of

¹¹The Union's only choice under the circumstances.

¹²I understand the Board to find that each new branch was a part of the certified unit.

¹⁴Otherwise it would not have found the employees of the four branches

¹¹I find this equivalent to a finding that the employees as they were transferred to the new branches always remained a part of the unit.

Respondent's employees at the Financial branch. I find this to be true.

The Union's demand for bargaining for the employees at the Financial branch has been continuing to date, since April 1966 and particularly since *December 22, 1966*, which latter date is not only within the Section 10(b) period but is also *within the certification year*. Respondent has refused to bargain with the certified Union since December 22, 1966, within the certification year, as to many employees within the certified unit. Respondent thus began its continuing 8(a)(5) and (1) violations within the certification year, and thus is not to be heard to argue that subsequently the certification year ran out and the Union's irrebuttably presumed continuing majority could be questioned. During the certification year, and since, particularly beginning with *December 22, 1966*, Respondent has not recognized the Union as the certified representative of the bargaining unit, as Respondent carved out various segments which remained part of the certified unit. Respondent has not complied with its bargaining requirements by recognizing the Union as representative of only a partial segment of the certified unit. Since Respondent has continually refused to bargain with the Union as the representative of all the employees within the certified unit, since a period within the certification year,¹⁵ the Union's irrebuttable presumption of majority status should be extended for 1 year from the date Respondent begins to bargain with the Union as the representative of all the employees included in the unit as clarified and as *supra* the certification was amended in the Board's decision, *supra*. Since Respondent has bargained, despite the Union's requests, for only a partial segment of the employees in the certified unit since December 22, 1966, it has failed to fulfill its obligations and has violated Section 8(a)(5) and (1) of the Act.

Because Respondent, since December 22, 1966, has continuously violated Section 8(a)(5) and (1) of the Act, it is not to be heard to claim that the filing of the RD petition, as amended,¹⁶ raised a good faith doubt of the Union's majority, because the very fact of refusing to bargain with the Union *within* and continuously since the certification year, encourages employee dissatisfaction with the certified representative and tends to encourage the filing of RD petitions. For the Respondent to claim that it had a good faith doubt as to the Union's majority because of the filing of RD petitions, after its violation of Section 8(a)(5) and (1) of the Act *within* and continuously since the original certification year, is to claim a premium for its unlawful activity which tended to cause the filing of RD petitions. See *Karp Metal Products Co., Inc.*, 51 NLRB 621, 624; *Sankrete of Northern California*, 142 NLRB 293.

Continuously since *within* the certification year, Respondent has not given "the bargaining relationship . . . a fair chance to succeed." *Frank Bros. Company v. N.L.R.B.*, 321 U.S. 702. Since this is so, the RD petitions raised no questions concerning representation, were properly dismissed, and cannot be considered as having raised any good faith doubt in the mind of Respondent as to the Union's continuing majority status.

It is not unnatural in claiming a good faith doubt as to appropriateness of the bargaining unit as consistently claimed by the Union, and as found by the Board, *supra*,

that Respondent should rely on the Regional Director's dismissal of the Union's 8(a)(5) charge in Case 2-CA-10932, and the dismissal's affirmance by the General Counsel primarily because both found the Financial branch to be a unit separate and distinct from the Commercial branch, and further that it should rely on the fact that the Regional Director found, as reversed by the Board, in its decision, *supra*, that there were four separate and distinct units. However, it is the Board, under the Act, which is charged with making determinations as to the appropriateness of units. The Board here found that since the certification in January 1966, there has been one and not two or three or four appropriate units and that the Union is the certified bargaining representative of the one unit, including four branches. Thus, the Board, in its decision, *supra*, has found and spoken, and held, "that the service employees assigned to the New York Financial, Queens and Westchester branches of the Employer's New York District are included in the certified unit." The Regional Directors for Regions 2 and 29, and the General Counsel and Respondent were wrong. Respondent's defense that at all material times it had a good faith doubt as to the appropriateness of the unit as continuously contended for by the Union and as found by the Board, is of no avail to it. "Good or bad faith is irrelevant where an employer's refusal is bottomed upon reasons other than those related to the union's majority status." *H & W. Construction Company, Inc.*, 161 NLRB 852. That Respondent had an erroneous view of the law, as found by the Board in its decision, *supra*, does not constitute a defense to Respondent's continued refusal to bargain with the Union since December 22, 1966. Good faith but erroneous doubt as to the appropriateness of a unit is not a good defense to a refusal to bargain complaint, where the unit is appropriate. Here, the Board has made its finding as to the appropriateness of the unit and assuming, *arguendo*, that Respondent, buttressed by the actions of two Regional Directors and the General Counsel, at all material times, had a view and a doubt contrary to the Board's holding and the Union's claim, such view and doubt avail it naught.

The Union having been the certified bargaining representative of all the employees included in the unit as found above, I make the following concluding findings based upon admitted allegations of the complaint, as amended.

As stated by General Counsel in his brief:

Respondent, by unilaterally changing pension, insurance and vacation coverage, unilaterally assuming medical insurance premiums, and refusing information to the Union necessary for collective bargaining violated Section 8(a)(5) and (1) of the Act.¹⁷

It is noted that some of the refusals to furnish information occurred subsequent to the Board's decision, *supra*

B. The Alleged Interrogation of Employees, Members of the Union's Negotiating Committee on August 8, 1968

The facts as to the alleged interrogation are in sharp dispute. The alleged interrogation admittedly occurred, if at all, in the absence of the Union's representative and during the course of bargaining.

included in *the* certified unit

¹⁵At least since December 22, 1966, within the 10(b) period

¹⁶Dismissed

¹⁷Of course, while admitting the factual allegations of the complaint in these regards, Respondent, consistent with its overall position, denies any violations of Section 8(a)(5) or (1).

In view of the primary importance of the 8(a)(5) and (1) issue which has been an issue since April 1966, beyond the Section 10(b) period, I certainly agree with the statement of counsel for the Charging Party in his brief that the question of interrogation is "irrelevant." Assuming, *arguendo*, that the testimony of General Counsel's witnesses as to what was said by way of interrogation at the bargaining session were credited, I would not find it coercive or violative of Section 8(a)(1) of the Act. I note the principal witness, James Corbett, told the Trial Examiner, when asked what employee was interrogated, that Rozier "didn't interrogate any particular person. There was talk going on between the whole committee and who was there." When he named an employee, Buser, he didn't remember "what he¹ did say." It is clear that the employee negotiating committee agreed to proceed with the bargaining without the union representative. I find no substantial evidence of a violation of Section 8(a)(1) by coercive interrogation on August 8. In any event, I would not recommend a remedial order for it. If it occurred, it was insubstantial and of no moment in the course of bargaining negotiations. If it occurred, it did not tend to be coercive. Let this very old question of bargaining rights of the Union be firmly and finally established and the Board should pay no heed to this alleged isolated instance of interrogation.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Respondent's activities in violation of Section 8(a)(5) and (1), set forth in section III, above, occurring in connection with the operations of 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 of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that since December 22, 1966, Respondent has unlawfully refused to bargain with the Union as the certified bargaining representative of all the employees in the unit for which the Union was certified. I shall recommend that Respondent, upon request, bargain with the Union and, if any 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. Respondent is an employer engaged in commerce within the meaning of the Act.
2. The UAW and its Local 365 are labor organizations within the meaning of the Act.
3. All field service engineers, including field engineers 1, field engineers 2, field engineers 3, and field engineers 4, sorter specialists, stockroom clerks, shipping room clerks and receiving room clerks employed by Burroughs Corporation at its Commercial, New York Financial, Queens and Westchester branches of its New York

District, excluding office clerical employees, sales representatives, sales technical personnel, all other employees, watchmen, guards and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of the Act.

From April 11, 1966, to February 13, 1967, the appropriate unit was as above but limited to Respondent's Commercial and Financial branches, and from February 13, 1967, to July 3, 1967, was limited to Respondent's Commercial, Financial, and Queen's branches, and since the latter date has included Respondent's Westchester branch. Since the original certification, there has only been but one unit.

4. Since January 11, 1966, the Union has been, at all times material, the certified exclusive bargaining representative of all the employees in the aforesaid unit, including the branches as carved out of the original Commercial branch unit, the latter branch and the three carved out units, constituting the unit as certified on January 11, 1966.

5. By refusing on and since December 22, 1966, within the certification year, to bargain collectively with the Union as the exclusive representative of *all* the employees in the certified appropriate unit, including the "carved out" branches, 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. By unilaterally changing pension, insurance, and vacation coverage, unilaterally assuming medical insurance premiums, and refusing to furnish information to the Union necessary for collective bargaining, particularly with respect to the three branches carved out of the Commercial branch, and which were part of the certified unit, Respondent violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

8. The refusal to bargain since December 22, 1966, began within the so-called certification year and the Union, not having been afforded a fair chance to succeed in bargaining for *all* the employees within the certified unit, within the certification year, the certified Union's majority status cannot be successfully challenged until Respondent accords the Union a full and reasonable opportunity to bargain with Respondent for *all* the employees of whom the Union is the certified bargaining representative.

RECOMMENDED ORDER

Upon the entire record in the case, including the foregoing findings of fact and conclusions of law, it is recommended that Respondent, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union, upon request, as the exclusive bargaining representative of all the employees in the above-described unit, including Respondent's Commercial, Financial, Queens and Westchester branches.

(b) Unilaterally making changes in the wages, hours and working conditions of any of the employees in the unit described in (a) immediately above.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union or any other labor organization or otherwise engage in activities protected by

¹Rozier.

the Act.

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

(a) Upon request, bargain collectively with the Union as the exclusive representative of its employees in the certified unit as clarified and amended in the Board's decision, *supra*, with respect to wages, hours of work, and other conditions of employment and, if an understanding is reached, embody same in a signed agreement.

(b) Post at its Commercial, Financial, Queens and Westchester branches of its New York District, copies of the attached notice marked "Appendix."¹⁹ Copies of said notice on forms provided by the Regional Director for Region 29, shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and maintained by it for a period of 60 days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the above Regional Director, in writing, within 20 days from the date of the receipt of this Decision and Recommended Order, what steps Respondent has taken to comply herewith.²⁰

¹⁹In 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."

²⁰In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps 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, upon request, to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and/or its Local 365, as the exclusive representative of all our employees in the unit described below.

WE WILL NOT unilaterally make any changes in the wages, hours and working conditions of any of our employees in the unit described below.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the below described unit, in the exercise of their rights to join or assist the above Unions or any other labor organization or otherwise engage in activities protected by the Act.

WE WILL, upon request, bargain collectively with either or both of the above Unions as the exclusive collective-bargaining representative of all our employees in the following unit with respect to wages, hours of work, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit:

Includes: All field service engineers, including field engineers 1, field engineers 2, field engineers 3 and field engineers 4, sorter specialists, stockroom clerks, shipping room clerks and receiving room clerks employed by us in our New York District, at our *Commercial, New York Financial, Queens and Westchester branches.*

Excludes: Office clerical employees, sales representatives, sales technical personnel, all other employees, watchmen, guards, and supervisors as defined in the Act.

BURROUGHS
CORPORATION
(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, 4th Floor, 16 Court Street, Brooklyn, New York 11201, Telephone 212-596-3535.